IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1011

DEMOCRATIC NATIONAL COMMITTEE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondent,

CBS, INC., et al.,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Democratic National Committee, Petitioner, respectfully prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in Case Numbers 75-1951 and 75-1944 seeking review of a judgment of that Court. The Court of Appeals affirmed a decision of the Federal Communications Commission, which reversed a statutory interpretation of over ten years duration and which held that

henceforth debates between qualified political candidates initiated by non-broadcast entities, and candidates' press conferences, will be exempt from the equal time requirements of Section 315 of the Communications Act of 1934, as amended.[1] Petitioner respectfully suggests that the panel's affirmance was incorrect, that the correct holding is contained in the dissenting opinion of Judge Wright, and that this proceeding is of such transcending importance in the interpretation and application of the equal time statute that it requires review by this Court. Indeed, so important is the question at issue to the forthcoming presidential election campaign, that Petitioner respectfully requests that the Court order that the matter be heard on an expedited basis.

OPINIONS BELOW

The declaratory ruling of the Commission here at issue was released September 30, 1975 (see Appendix 1). The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming, by split vote (2-1), the Commission's Order was entered April 12, 1976 (see Appendix 2) and the Court of Appeals Order denying rehearing was entered May 13, 1976 (see Appendix 3).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Commission erred as a matter of law in interpreting the 1959 amendments to the Communications

[1] 47 U.S.C. § 315, 48 Stat. 1088.

Act of 1934[2] so as to exempt candidates' press conferences from the equal time provisions of Section 315 of the Act.

STATUTORY PROVISION INVOLVED

The relevant provisions of Section 315(a) of the Communications Act of 1934 are set forth in Appendix 4.

STATEMENT OF THE FACTS

This case involves what the majority panel of the Court of Appeals recognized to be (App. 2, p. 25a) "perhaps the most important interpretation of the equal time provisions of the Communications Act of 1934 [citation omitted] which has arisen in the past decade." The matter has a significant background and history.

A. Background

The 1959 Amendments creating certain exemptions from the "equal time" requirements of § 315 of the Communications Act of 1934 were enacted primarily as a result of the so-called *Lar Daly* case,[3] in which the Commission

[2] P.L. 87-274, § 1, 73 Stat. 557, amending 47 U.S.C. § 315.

[3] *CBS, Inc. (WBBM-TV)*, 18 P&F RR 238, reconsidered at length in *Columbia Broadcasting System, Inc. and National Broadcasting Co.*, Interpretive Opinion of June 15, 1959, 26 FCC 715 (hereinafter "*Lar Daly*"). In *Lar Daly*, Chicago television stations had, in the course of their newscasts, shown film clips of the Democratic and Republican candidates for nomination for the Office of Mayor of Chicago. Lar Daly, perennial candidate and a candidate in both primaries, demanded equal time. The Commission held that an appearance by a legally qualified candidate on a regularly scheduled news program gave rise to a right of equal time by all legally qualified opponents.

held that an appearance by a candidate on a news program, no matter in what capacity and for what reason, gave rise to a right of "equal time" by legally qualified opponents, whether or not these opposing candidates were major or minor, and regardless of whether the candidate could, by any practical assessment, be elected. The Commission's decision stirred Congressional concern that it was unnecessarily narrow. In order to lessen the impact of *Lar Daly*, Congress amended § 315 of the Act in 1959 so as to exempt appearances by candidates on certain news and news related programs from the equal time provisions of the Act.[4] These exemptions cover appearances by candidates on: (a) bona fide newscasts, (b) bona fide news interviews, (c) bona fide news documentaries (if the appearance of the candidate is incidental to the presentation of such coverage by the news documentary) and (d) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).[5]

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[4] As pointed out in the House Report to the 1959 Amendments (Report No. 802, 86th Cong., 1st Sess., pg. 4):

> Thus, it is necessary, in the public interest, to achieve a balance between substantial equality of opportunity of political candidates on the one hand, and the need, on the other hand, of broadcasters to be free from unreasonable restraints in the exercise of their news judgment insofar as the appearance of political candidates is concerned.

[5] The legislative history of the 1959 Amendment is extensive and was extensively discussed in the majority and minority opinions in the Court of Appeals. See Appendix 2, *infra*.

A number of questions immediately arose as to the proper meaning and scope of these exemptions and, as is Commission practice, those questions were handled by interpretive rulings on a case-by-case basis which later were collated and published by the Commission in the Federal Register as a guide and outline.[6]

Specifically, in 1964, the Columbia Broadcasting System sought a declaratory ruling on the question whether a presidential press conference, called during the period when the President was a candidate for re-election, fell within the 1959 exemptions either as a "bona fide news interview" or as a "bona fide news event." CBS asserted that the 1959 Amendment was ambiguous on the point and sought Commission interpretation.

The Commission, in a 1964 landmark decision,[7] held that presidential press conferences cannot qualify either under the "bona fide news interview" exemption, or the "bona fide news event" exemption. They were not "bona fide news interviews" because the "content, format and participants thereof" were not under the control of the licensee but rather were controlled by the candidate; they were not "bona fide news events" because interpreting a press conference as a "bona fide news event" would, in effect, nullify the equal time objectives of §315, and would deprive the other three exemptions of any meaning. Specifically, the Commission noted and expressed approval of two

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[6] *Use of Broadcast Facilities by Candidates for Public Office*, 35 Fed. Reg. 13048.

[7] Letter of September 30, 1964 to *Columbia Broadcasting System, Inc.*, 40 FCC 395 (1964) (hereinafter "*Columbia Broadcasting System*").

earlier holdings,[8] explaining that (40 FCC at p. 398):

> . . . if the sole test of the on-the-spot coverage exemption is simply whether or not the station's decision to cover the event and to put it on a broadcast program constitutes a bona fide news judgment, there would be no meaning to the other three exemptions in § 315(a) since these, too, all involve a bona fide news judgment by the broadcaster. Carried out to its logical conclusion, this approach would also largely nullify the objectives of § 315 'to give the public the advantage of a full, complete, and exhaustive discussion, on a fair opportunity basis, to all legally qualified candidates and for the benefit of the public at large.' (footnote omitted).
>
> In any campaign for political office which attracts the interest of the electorate, the statement and actions of a candidate for that office could always be deemed 'on-the-spot coverage of bona fide news events.' And this would be so whether the statement and appearance is a debate with an opposing candidate or is a separate speech and individual appearance of but one candidate. It is clear, however, that the 1959 amendment which was enacted by Congress reflected a resistance by the Congress to

[8] Letter of October 19, 1962 to *The Goodwill Station, Inc.*, 40 FCC 362 (hereinafter "*Goodwill*") and letter of October 26, 1962 to *National Broadcasting Company, Inc. and Columbia Broadcasting System, Inc.*, 40 FCC 370 (hereinafter "*Wyckoff*") in which the Commission held that live coverage of a debate between two candidates would not be exempt, either as a "bona fide news event" or a "bona fide news interview."

> any such broad scale delimitation of a broadcaster's obligation under § 315.

The Commission stressed what it perceived to be Congressional intent to "limit carefully the exceptions from § 315," (40 FCC at p. 398) citing the remarks of Chairman Harris, Chairman of the House Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce.

The Commission's 1964 Ruling in *Columbia Broadcasting System* was reported to Congress,[9] was published as part of the Commission's 1966 and 1970 "Primer" on Commission interpretation of § 315,[10] was explicitly reaffirmed in 1968 with court approval[11] and became the governing standard on the point for the next decade. Petitioner is unaware of any instance during the period 1959 through September, 1975 in which the Commission deviated from the thrust of its *Columbia Broadcasting System* interpretation.

On July 8, 1975, President Ford formally announced his intention to seek the Republican nomination for the Office of President of the United States, thus rendering him a legally qualified candidate for the nomination of his party to the office of President within the meaning of § 315 and the Commission's Rules and Regulations.

[9] See 31st Annual Report by Federal Communications Commission to Congress, 1965, at p. 86.

[10] See *Use of Broadcast Facilities by Candidates for Public Office*, 35 Fed. Reg. 13048, Q. & A. 27 at page 13056.

[11] *In re Socialist Labor Party*, 15 FCC2d 98 (1968), affirmed per curiam sub nom. *Taft Broadcasting Co. v. Federal Communications Commission*, Case No. 22445, D.C. Cir. (unreported).

As a result of President Ford's announcement, the Columbia Broadcasting System, on July 6, 1975, petitioned the Commission for a declaratory ruling reversing the Commission's 1964 *Columbia Broadcasting System ruling*, and sought a holding that full, live coverage[12] of presidential press conferences would be exempt under the 1959 Amendment to § 315, and that broadcasters who "in their bona fide news judgment carry presidential press conferences" will not incur "equal opportunities" obligations.

The CBS request was opposed by Petitioner, by the Honorable Shirley Chisholm, and by the National Organization for Women.

On September 30, 1975, the Commission released its Memorandum Opinion and Order here under review, reversing its 1964 *Columbia Broadcasting System* holding with respect to press conferences, and also its 1962 *Wyckoff* and *Goodwill* decisions with respect to debates. (See 55 FCC2d 697, reprinted as Appendix 1 hereto.) The Commission held (5-2) that henceforth debates initiated by non-broadcast entities, and press conferences by all candidates (presidential or otherwise),[13] would be exempt

[12] It should be noted, and all parties here would agree, that under the 1959 Amendment (specifically § 315(a)(1)), broadcasters are free to broadcast *portions* of press conferences as part of regularly scheduled newscasts without incurring "equal time" obligations, although they might face "fairness doctrine" demands.

[13] In this respect, the Commission went further than CBS had requested. CBS had only asked that presidential news conferences be exempt because of their unique news value. CBS appeared to recognize that a broader exemption was unwarranted and would not be in accord with Congressional intent.

from § 315 requirements if they were covered live, based upon the good faith determination of licensees that they were "bona fide news events" worthy of presentation, and provided further that there was no evidence that the broadcasters intentionally designed the programming to aid the candidacy of any particular candidate. The Commission treated the question of debate coverage and coverage of presidential press conferences as stemming from the same root, and as treatable by the same standards.

Recognizing that its opinion was a drastic change in policy, the Commission explained that its 1962 *Wyckoff* and *Goodwill* decisions had been based upon what it now determined to be an incorrect reading of legislative history, and that it was erroneous in 1962 in applying what it characterized as an "incidental to" test to determine exemptability.[14] The Commission believed, with respect to debates, that the only relevant criteria in determining whether a particular debate was exempt as an "on-the-spot bona fide newscast," was whether the coverage was undertaken solely as a result of the licensee's news judgment that the event was worthy of coverage, and was not designed by the licensee to further the interests of a particular candidate.

Turning to the question of press conferences, the Commission treated its prior 1964 *Columbia Broadcasting System* Ruling as relying solely upon the so-called "incidental to" test enunciated in *Wyckoff* and *Goodwill*, and, having

[14] The Commission in *Wyckoff* and *Goodwill* stated that debates would not be considered "bona fide news events" under the meaning of the 1959 Amendment because the appearance of the candidates was the central aspect of the debates, while the exemption was only meant to apply where the appearance of the candidate on a news feature was "incidental to" the news feature.

overruled those two cases, treated the press conference issue as foreclosed. The Commission held (App. 1, Par. 30, 55 FCC2d at 708):

> . . . press conferences do not lose their exemption merely because the candidate's appearance is the central aspect of the news event. The Commission allows reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to eligibility for § 315 exemption to their reasonable and good faith judgment.

Thus, the Commission believed Congress intended the licensee's judgment and intent to be dispositive. If a licensee believed, in good faith, that the press conference was a bona fide news event, then full, live coverage of the conference would be exempt from "equal time" requirements, and would not lose its exemption merely because the appearance of the candidate was a central aspect of the event itself. The Commission argued that its reversal of its prior decisions "comports with the original legislative intent and serves the public interest by allowing broadcasters to make a fuller and more effective contribution to an informed electorate" (App. 1, Par. 27, 55 FCC2d at 706). The Commission's only reference to the rationale which underlay its 1964 decision (i.e. that recognizing the exemption would swallow the rule) was that it limited its present interpretation of the exemptions only to debates and press conferences which, it believed, "preserved the essential nature of the exemption." (App. 1, par. 28(a), 55 FCC2d at 707).[15]

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[15] Petitioner believes that the Commission's recitation in its 1975 Order of its 1964 decision misstates the essential thrust of the 1964 (continued)

Commissioners Hooks and Lee dissented from the Order here under review, asserting that it misread Congressional intent,[16] would render the exemptions a nullity since the Commission could not logically limit its rationale only to debates and press conferences,[17] and that a change in policy of this magnitude should not be undertaken without Congressional guidance.[18] (App. 1, 55 FCC2d 712-716.)

A request for stay of the Order was denied (55 FCC2d 719), and on September 26, 1975, The Honorable Shirley Chisholm and the National Organization for Women filed a

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[15] (continued)

Columbia Broadcasting System decision. The gist of the 1964 decision was not the application of the "incidental to" test; indeed, that test was not mentioned. The 1964 rationale was simply that recognition of CBS's argument would, in effect, nullify and render meaningless the 1959 Amendment *in toto*.

[16] Commissioner Lee stated that the Order "created a loophole to Congress' intent that allows grossly unbalanced coverage of the political activities of political opponents. . . ." (App. 1, 55 FCC2d at 713).

[17] Hooks Dissent (App. 1, 55 FCC2d at 715). Hooks stated:

> If the gravamen is the transmittal of substance to the populace, a statement delivered from a soap box in Times Square – from a legal and policy aspect – is equally deserving of a 315(a)(4) exemption.

[18] Lee Dissent (App. 1, 55 FCC2d at 713). Lee stated (*Ibid.*):

> At a minimum, it should be made in the context of a rulemaking proceeding where guidelines for broadcaster judgment can be considered. The preferable procedure, however, is to let Congress define the policy.

petition for review of the Commission's Order. On October 8, 1975, Petitioner, the Democratic National Committee, filed a similar petition. The cases were consolidated and ordered argued on an expedited briefing schedule.

On April 12, 1976, the Court of Appeals affirmed, by divided opinion (Judges Tamm and Wilkey affirming, with Judge Wright dissenting). Although the majority of the panel candidly admitted inability to find a clear legislative history to support the Commission's reversal of its own long-standing precedent (App. 2, Slip Opinion, page 7), could find only that the legislative history provides "inconclusive support" for the Commission's interpretation (App. 2, Slip Opinion, pp. 4, 15, 18) and was admittedly "unable to reach a definite conclusion from the legislative history" on the critical issue of the case, i.e., whether broadcaster discretion was intended to be the "sole criterion" of the bona fide nature of a news event (Slip Opinion, p. 23), nevertheless, it relied on the judicial maxim of giving deference to an administrative agency in construing its organic statute, so long as it could find some support for that interpretation in the legislative history of the statute.

The dissenting judge disagreed, asserting that (a) the Commission's action exceeded its Congressionally delegated authority, (b) the Commission improperly substituted its own judgments for decisions made by Congress, (c) the Commission granted to broadcasters a power far in excess of that which Congress intended to convey, and in fact has granted to broadcasters a breadth of power which they long requested from Congress, but which Congress repeatedly denied to them, (d) the interpretation which the Commission now gives to one provision of the exemptions to Section 315 effectively obliterates and swallows

up the meaning of the other exemptions, an approach not in line with traditional canons of statutory construction, (e) the majority improperly slights legislative history subsequent to the Commission's original interpretation when, under the circumstances of this case, Congressional acquiescence and the Commission's original interpretation (with Congressional knowledge of that interpretation) cannot so easily be ignored, and (f) the circumstances in this case, the importance of the question, and the Commission's failure to seek public comment represents a failure of compliance with the provisions of the Administrative Procedure Act.

B. Argument

Petitioner respectfully submits that Judge Wright's analysis was correct. The Commission's attempt to rewrite the equal time provision of Section 315 in a manner which deprives the public and the candidates of the equal treatment which has heretofore been the quintessential element of Section 315, cannot be allowed to stand. Until the Commission's recent reinterpretation, Section 315 had been a hallmark of equality. It operated with a known precision to give all candidates precisely equal treatment. It protected the public against any attempt by the broadcaster to favor one candidate over another but, perhaps more important, it treated all candidates equally, without bias in favor of any.

The effect of the Commission's recent reinterpretation is simply that, as the dissenting Commissioners and dissenting Judge Wright recognized, the Commission's Rule establishes a bias in favor of incumbents, particularly in the area of incumbent press conferences. Although the Commission's ruling has the appearance of objectivity because it exempts press conferences of all candidates, whether incumbent or not, in fact it will operate in favor

of incumbents occupying the highest political positions.[19] It is far more likely that a press conference of an incumbent will be covered than that of one of a number of his existing or potential opponents, and this is true even if (as will usually be the case) the broadcaster who chooses to cover the press conference as a "bona fide" news event exempt from the equal time rules, does so without any intent to favor the candidate. Making the test of exemption merely the asserted good faith of the broadcaster may protect the public against malevolent broadcasters, but it effectively destroys the concept of equality among candidates which has heretofore been the distinctive contribution of Section 315. The Commission's interpretation has literally stood Section 315 on its head, converting a precise restriction on broadcasters with respect to their treatment of political candidates, into a grant of power to control access far in excess of anything warranted in the entire legislative history of Section 315.

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[19] Indeed, it has already done so. See "In Focus," *The Washington Star*, April 5, 1976, pp. A-1, A-10:

> "Reagan has already felt the sting of the FCC exemption. One week before the first primary in New Hampshire, the President called a press conference – ostensibly to talk about overhauling the intelligence community.
>
> Ford then proceeded to use a large segment of the live broadcast time to attack his GOP opponent on issues ranging from Social Security to income and tax disclosure. He slid the campaign digs into his answers to questions from reporters, even when they had little relationship to the specific question asked.
>
> The prime-time coverage didn't cost Ford a penny. The networks, now under no obligation to make equal time available to Reagan, naturally didn't offer him any opportunity for rebuttal. One week after the President's press conference, Reagan narrowly lost the New Hampshire primary – a contest he had been expected to win."

Perhaps the most curious aspect of the Commission's decision is that it purported to base its result on Congressional intent, yet it completely ignored legislative history subsequent to the adoption of the amendment, history which argues persuasively that the Commission's original interpretation denying press conferences exemption was correct. The Commission's 1964 *Columbia Broadcasting* holding denying press conference exemption was well-known to Congress; it was presented to Congress as part of the Commission's yearly report; it was reaffirmed by the Commission in the *Socialist Labor Party* case in 1968,[20] and was affirmed without opinion by the same Court of Appeals which has now affirmed a precisely opposite result. Congress has since 1963 revised Section 315 in a number of particulars, yet at no point did it indicate its belief that the Commission had erroneously interpreted Congressional intent in the *Columbia Broadcasting* and *Socialist Labor Party* cases.[21] This long-term Congressional acquiescence is, under the familiar doctrine of the "Reinactment Rule," persuasive evidence that the Commission's original, rather than its subsequent interpretation is the correct one.

The majority's lack of enthusiasm for its affirmance is evidenced in the concluding paragraph of its opinion where it points out that (App. 2, Slip Opinion, p. 37):

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[20] *In re Socialist Labor Party*, 15 FCC2d 98 (1968), affirmed per curiam sub nom. *Taft Broadcasting Co. v. Federal Communications Commission*, Case No. 22445, D.C. Cir. (unreported).

[21] Indeed, after the Commission's reinterpretation, Senator Pastore took pains to point out that the Commission's reinterpretation was precisely opposite to Congressional intent.

> . . . we take comfort in the realization that Congress may correct the Commission if it has misinterpreted Congressional intent or overstepped the bounds of its discretion.

Quite true. But it is extremely unlikely that Congress will be able to act in time to affect the 1976 Presidential election campaign wherein the "press conference" exemption will be felt most strongly. Indeed, unless this Court acts expeditiously to hear and decide the instant matter, the harm done by the Commission to the equal time document cannot be avoided in the 1976 Presidential campaign. Because Petitioner feels that the Commission's judgment was clearly wrong, and because the question is of such pressing and immediate importance to the election campaign, Petitioner respectfully requests that the Court hear and decide the case as soon as possible.

Respectfully submitted

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APPENDIX 1

OPINION OF THE FEDERAL COMMUNICATIONS COMMISSION

FCC 75-1090

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PETITIONS OF THE ASPEN INSTITUTE PROGRAM ON COMMUNICATIONS AND SOCIETY AND CBS, INC., FOR REVISION OR CLARIFICATION OF COMMISSION RULINGS UNDER SECTION 315 (a)(2) AND 315(a)(4)

Declaratory Order

MEMORANDUM OPINION AND ORDER

(Adopted September 25, 1975; Released September 30, 1975)

BY THE COMMISSION: COMMISSIONERS LEE AND HOOKS DISSENTING AND ISSUING STATEMENTS; COMMISSIONER QUELLO ISSUING A STATEMENT IN WHICH COMMISSIONER ROBINSON JOINS; COMMISSIONERS WASHBURN AND ROBINSON ISSUING SEPARATE STATEMENTS.

1. The Commission is in receipt of petitions filed by Mr. Douglass Cater, Director of the Aspen Institute Program on Communications and Society (Aspen), received April 22, 1975, and by CBS, Inc. (CBS), received July 16, 1975. Both petitions raise questions concerning the applications of the provisions of Section 315 of the Communications Act.

2. Aspen seeks revision or clarification of the Commission's policies concerning the applicability of the 1959 Amendments to Section 315 to certain joint appearances of political candidates. It is urged, that the two revisions will enable broadcasters to "more effectively and fully . . . inform the American people on important political races and issues" and to "make the Bicentennial a model political broadcast year."

3. The two revisions sought by the Institute are:

(1) The Commission should give the Section 315(a)(4) exemption for on-the-spot coverage of bona fide news events its proper broad remedial construction, and should thus overrule the *NBC (Wyckoff)* and *Goodwill Station* decisions; [1] and

(2) The Commission should clarify its position on Section 315 (a)(2)—the exemption for bona fide news interview programs—in light of the *Chisholm* case.[2]

These are crucial, in Aspen's view, because the Commission, in its interpretive rulings, has not given full scope to the Congressional purpose in enacting the 1959 Amendments to Section 315, and its rulings

[1] *The Goodwill Station, Inc.*, 40 FCC 362 (1962); *National Broadcasting Co.*, 40 FCC 370 (1962).

[2] *Hon. Sam Yorty and Hon. Shirley Chisholm*, 35 FCC 2d 572, *remanded and order for interim relief granted*, No. 72-1505, D.C. Circuit, June 2, 1972, *on remand*, 35 FCC 2d 579 (1972).

are founded upon mistaken assumptions and interpretations of law, which must be acknowledged and corrected as a matter of law and policy.

4. The Institute seeks these revisions in the context of Docket No. 19260, which addressed political broadcasting issues or, in the alternative, in a new policy statement or declaratory ruling.

5. Because the proposed revisions concern a broader set of issues than those discussed in the *Fairness Report*, 48 FCC 2d 1 (1974), and in the *First Report-Handling of Political Broadcast*, 36 FCC 2d 40 (1972), we believe that these broader issues should not be decided without further consideration in a more expansive proceeding.[3] However, the first issue raised by the petition as to the legal misinterpretation which underlies our 1962 decisions with respect to Section 315(a)(4), can be dealt with at this time in a declaratory ruling.[4]

6. CBS requests a declaratory ruling that Presidential press conferences are exempt from the "equal opportunities" provision of Section 315 of the Communications Act. CBS contends that the live broadcast of such news conferences constitutes (1) "on-the-spot coverage of bona fide news events," within the meaning of Section 315(a)(4) of the Act, and (2) "a bona fide news interview," within the meaning of Section 315(a)(2) of the Act. Petitioner urges that we re-examine our decision in *Columbia Broadcasting System, Inc.*, 40 FCC 395 (1964) (hereinafter referred to as *CBS*).[5]

7. Section 315. as it was originally worded. established a principle of absolute equality for competing political candidates in the "use" of broadcast facilities. In the 1959 "Lar Daly" case, the Commission interpreted the statute to mean that the equal time rule applied even to the appearance of a candidate on a regularly scheduled newscast. *Columbia Broadcasting System*, 18 RR 238, *reconsideration denied*, 18 RR 701 (1959). Daly, a perennial candidate in both the Republican and Democratic mayoralty primaries in Chicago, had complained to the Commission that several stations presented newsclips showing the major candidates in the two primaries but refused to afford him equal time. The Commission ruled that the presentation of these film clips were "uses" within the meaning of the statute, and that consequently Daly was entitled to equal time. The Commission's position on this matter created a national furor, and it was feared that this strict application of the equal opportunities provision "would tend to dry up meaningful radio and television coverage of political campaigns." Sen. Rep. No. 562. 86th cong. 1st Sess. 10 (1959).

8. This concern led Congress to a realization that the concept of absolute equality among competing political candidates would have to give way, to some extent, to two other "worthy and desirable" objectives:

> First, the right of the public to be informed through broadcasts of political events; and Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events.

[3] We expect to reconsider the issues raised in our *Chisholm* ruling, *supra*, among other political broadcast questions, at that time.

[4] Parties who wish to challenge this Declaratory Ruling on appeal will have an opportunity to do so well in advance of the 1976 elections. *Felix v. Westinghouse Radio*, 186 F. 2d 1 (3rd Cir. 1950), *cert. denied*, 341 U.S. 909 (1951).

[5] Informal comments have been filed in opposition to this request by the Democratic National Committee, which urges us to reaffirm the validity of the *CBS* decision. See paragraph 17, *infra*. An additional request for the same relief asked for by Aspen was filed by Henry Geller on September 18, 1975.

Hearings on Political Broadcasts-Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 2 (1959) (comments of Chairman Harris).

9. In order to attain these worthy objectives. Congress adopted the 1959 amendments to the Communications Act. These amendments provided that an appearance by a candidate on any one of four types of news programs should not be deemed to be a "use" of the station by that candidate. The four categories of exempt programs are as follows:

> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

The Congress also provided that the Commission should have broad discretion in interpreting and implementing the new policy. See 47 U.S.C. § 315(c). Indeed, in the words of the Senate Report:

> It is difficult to define with precision what is a newscast, news interview, news documentary, or on-the-spot coverage of news event. . . . That is why the committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. . . . In this way the Commission will be able to determine on the facts submitted in each case whether a newscast, news interview, news documentary, [or] on-the-spot coverage of news event . . . is bona fide or a "use" of the facilities requiring equal opportunity.

Sen. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

10. In *The Goodwill Station, Inc.*, radio station WJR broadcast a debate sponsored by the Economic Club of Detroit between two major candidates for Governor of Michigan, then-Gov. John B. Swainson and Republican challenger George Romney. The two participants were invited by the Club to debate issues following a dinner meeting. Neither had any part in establishing the format for the debate. The candidates appeared as invited, debated, and following the debate answered questions posed by Economic Club members. Each candidate had an opportunity to respond to an equal number of questions. Station WJR merely covered "live," the debate and question and answer period. It exercised no control whatsoever over the program content. The Commission ruled that this was not a "bona fide news event" under Section 315(a)(4), a ruling which had the effect of affording equal time to the candidate of the Socialist Labor Party, a party which in the previous election received only 1,479 votes out of a state-wide total of 3,255,991. The Commission's construction of 315(a)(4) excluded debates from that exemption. Indeed, it concluded that only events "incidental to" the presentation of a *bona fide* news event (e.g., where a Congressman seeking re-election appeared in connection with a ribbon cutting ceremony for a new highway or bridge) or some, but not all, activities incidental to the presentation of a political convention might be exempt. The Commission based its conclusion on House Report No. 802, 86th Cong. 1st Sess., August 6, 1959. It took the position

that the deletion of the term "debate" from the House version of the bill, as well as the evidence of Congressional action in 1960, which permitted the Great Debates, which it assumed to have been outside the 1959 Amendment's exemptions from Section 315, clearly indicated a legislative intent that debates were not exempt formats. Further, it said that the 315(a)(4) exemption for "on-the-spot coverage of *bona fide* news events", if applied to debates, would result in the exemption swallowing the rule.

11. *National Broadcasting Co., supra*, involved a debate between Governor Brown of California and Richard Nixon before the annual convention of the United Press International which NBC covered "live." The debate was arranged by UPI, and NBC had nothing to do with the arrangements.[6] Indeed, NBC was not invited to cover the debate until after the arrangements had been completed. However, it decided to cover the event, as did all the major newspapers in California, based upon its assessment that the event was singularly newsworthy. The Commission held that equal time must be afforded to the Prohibition Party's candidate for Governor, thereby virtually eliminating the possibility that such debates would receive further broadcast coverage. In elaborating on its *Goodwill Station* opinion, the Commission stated that merely because an event might be considered newsworthy by the broadcaster did not make the event "bona fide" for purposes of the exemption. The Commission said:

> Where the appearance of a candidate is designed by him to serve his own political advantage and such appearance is ultimately the subject of a broadcast program encompassing only his entire appearance, such program cannot be considered to be on-the-spot coverage of a bona fide news event simply because the broadcaster deems that the candidate's appearance (or speech) will be of interest to the general public and, therefore newsworthy. For as Chairman Harris stated in discussing the conference report on the House floor, an "appearance of a candidate in the on-the-spot coverage of news events is not to be exempt from the equal time requirements unless the program covers bona fide events." And no assertion has been made by either CBS or NBC that this program encompassed any aspect of the UPI convention other than the joint appearance of Governor Brown and Mr. Nixon.

The Commission, in conclusion, repeated that it did not question the broadcaster's news judgment but only the contention that it should consider only the broadcaster's news judgment in the context of the legislative guidelines for the 315(a)(4) exemption.

12. In *CBS*, we held that press conferences of the President, or a non-incumbent candidate for election to the presidency, would be considered non-exempt "uses" within the meaning of Section 315. In that decision we relied on the language of the Conference Report accompanying the bill containing the 1959 Amendments to Section 315 which stated that in order to qualify for exemption as "bona fide news interview" within the meaning of Section 315(a)(2), a broadcast must meet each of the following criteria:

(1) The broadcast must be regularly scheduled.

(2) The selection of the content, format, and participants of the broadcast must be under the exclusive control of the licensee or network.

[6] Neither of these cases involved a debate or joint appearance in a studio.

(3) Broadcaster decisions as to format, content, and participants must have been made in the exercise of bona fide news judgment and not for the political advantage of any candidate.

13. In addition, we held that the broadcast of such press conferences failed to qualify for exemption as "on-the-spot coverage of bona fide news events," within the meaning of Section 315(a)(4). This conclusion rested on our decisions in *Goodwill Station* and *Wyckoff, supra*. We also stated that the mere fact that an event might be considered newsworthy by the broadcaster did not, *per se*, bring the event within the Section 315(a)(4) exemption, and that we were not questioning the networks' news judgment but only the contention that the Commission should consider only such news judgment in determining whether a broadcast was exempt under Section 315(a)(4).

14. In support of its contention that live broadcast of Presidential press conferences constitutes "on-the-spot coverage of bona fide news events," within the meaning of Section 315(a)(4), CBS argues that a reasonable decision by a broadcaster that a Presidential press conference is sufficiently newsworthy to merit on-the-spot live broadcast coverage should be determinative of whether the broadcast is exempt under Section 315(a)(4).

15. CBS stresses the unique status of the Presidency and the inherent newsworthiness of Presidential communications with the public. Thus, it contends, a distinction must be drawn between those Presidential press conferences called by a President-candidate in furtherance of his duty as Chief Executive to keep the people informed on important national and international issues, and purely political press conferences.[7] The network claims that, under the *CBS* decision, no such distinction is drawn and, hence, any press conference now called by President Ford—political or non-political—will give rise to "equal opportunity" rights in opposing candidates and will, therefore, be effectively barred from live broadcast coverage by licensees.

16. To support its assertion that a Presidential press conference constitutes a "bona fide news interview," within the meaning of Section 315(a)(2), CBS submits that while the regularity of broadcast of a news interview program and its control by the licensee are relevant considerations in determining whether or not such an interview is exempt from the "equal opportunities" provision of Section 315, the Commission's perspective in evaluating these considerations has been too narrow. Thus, CBS submits that in our decision in *CBS, supra*, the Commission applied an overly strict and mechanistic definition of the term "regularly scheduled." In its view, this term is most reasonably construed as meaning "recurrent in the normal and usual course of events," rather than as "recurrent at fixed and uniform time intervals." See *CBS, supra*, 40 FCC at 404 (dissent of Commissioner Loevinger). Presidential press conferences are "regularly scheduled," since they have been held over the course of many years and are held on a periodic basis. With respect to the element of licensee control, it is claimed that Congress's primary concern with control of news interview programs was that such control be outside the hands of a candidate; it takes the view that Congress did not intend that such control

[7] In this respect, CBS relies heavily on the 1964 dissenting opinions of Commissioners Ford and Loevinger and the separate opinion of Chairman Hyde (which was in substance a dissent).

remain exclusively with the broadcaster. Finally, CBS contends that the principle concern of Congress with respect to "bona fide news interview" programs was the prospect of rigging by some local broadcasters to promote the candidacies of local candidates, and that this concern is obviated in the case of nationwide broadcast of Presidential press conferences. Thus, although a President may make a statement before opening the session to questions, the crux of the press conference is in the questions and answers themselves, and such questions are out of the hands of the President.

17. The Democratic National Committee (DNC), in its informal comments, concedes that "past decisions should be re-examined in light of new facts, new laws, or new interpretations of past laws and facts." However, DNC contends that the reversal of the Commission's 1964 *CBS* decision would, in effect, "nullify the objectives of Section 315 and render it meaningless as it applies to Presidential elections." DNC further contends that the purpose of the 1959 Amendments was "to provide enough leeway to broadcasters to disseminate the news without incurring equal time obligations," and that "CBS is free to broadcast portions of the Presidential press conference on bona fide news shows or bona fide news documentaries." In its view, an exemption for Presidential press conferences from Sections 315 would "deprive opposing candidates of equal opportunities" and would cause "irreparable damage . . . to its 1975 Presidential nominee" and all future candidates opposing incumbent presidents. DNC urges the Commission to retain the "incidental to" test which it has applied since 1962 in interpreting Section 315(a)(4). It contends that if the Commission abandons this test, it is left to determine only whether a licensee's judgment that a program is newsworthy is reasonable, and that the FCC would be left with neither a rational test for determining either the bona fides of a broadcast news event, nor a test with the precision of the equal time rule.

18. DNC also opposes the CBS contention that "regularly scheduled news interviews" refers to "recurrent in the normal and usual course of events, rather than at fixed and uniform time intervals." In its view, that interpretation would be administratively unworkable, and could make a farce out of the well defined news interview exemption. It also contends that the legislative history does not support this CBS assertion. Furthermore, it believes that Presidential press conferences, called at the whim of the President, are subject to abuse. It also believes that many of the significant factors associated with Presidential press conferences are under the control of the President and, thus, the problem of abuse would be heightened by exemption of such programs in direct disregard of the "control" requirement as set forth in the legislative history.

19. DNC believes that the Commission should take into consideration: (1) that if Section 315 is to continue to work effectively, it must continue to work with the "automatic and mathematical" precision it has exhibited in the past; (2) the equal time requirement posits a particular right in candidates to ensure that they receive an equal opportunity of access to the airways in order to discuss campaign issues, and such rights should not be left to the whim of a station or network; (3) the impact of such a ruling would inhibit the chances

of any candidate's bid to unseat an incumbent President running for re-election; (4) that the President's unique status as a newsworthy individual should not be determinative in this case; (5) such an interpretation would be inconsistent with the interpretations of the First Amendment in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

20. The Media Access Project (MAP) has filed a lengthy informal pleading on behalf of the National Organization of Women (NOW) and Congresswoman Shirley Chisholm. MAP argues that the Commission cannot properly issue declaratory rulings in this matter, but may only proceed by way of a rulemaking proceeding. Aside from the procedural arguments, MAP essentially alleges that the potential for abuse of the exemptions in Section 315 requires the Commission to prohibit any use of the exemptions for on-the-spot coverage of bona fide news events. Additionally, it is argued that if a candidate intends to gain an advantage by his or her appearance, coverage of the appearance may not be exempt, and that debates may never be exempted because Congress did not create a specific exemption for them. Moreover, MAP argues that the Commission could, as a matter of administrative discretion, use a test which was rejected by Congress in its determination—the "incidental to" test applied in the 1962 decisions.

21. For the reasons discussed below, we hereby overrule our earlier decisions in *The Goodwill Station, Inc., Supra*, and *National Broadcasting Co., supra*, and will in the future interpret § 315(a)(4), so as to exempt from the equal time requirements of Section 315 debates between candidates as "on-the-spot coverage of bona fide news events" in situations presenting the same factual contexts in *Goodwill Station* and *Wyckoff*. At the same time we overrule that part of the 1964 *CBS* decision which relies on *Goodwill Station* and *Wyckoff*, for reasons also discussed below. Thus the press conferences of the President and all other candidates for political office broadcast live and in their entirety, qualify for exemption under Section 315(a)(4).[8]

DISCUSSION

Debates: The Aspen Petition

22. As Aspen points out, and after thorough review we are compelled to agree, the Commission's decisions in *Goodwill Station* and *Wyckoff*, are based on what now appears to be an incorrect reading of the legislative history of the newscast exemptions and subsequent related Congressional action. Our conclusion that the debates were not exempt rested on language in the House Report of August 6, 1959, which indicated that in order for on-the-spot coverage to be exempt the appearance of the candidates would have to be "incidental to" the coverage of a separate news event. *The Goodwill Station, Inc.*, 40 FCC at 364. It was obvious, of course, that in a debate between two candidates the appearance of neither could be deemed to be incidental to the news event. Indeed, the appearance of the candidates would naturally be the central focus of the event. The problem with this reasoning is

[8] Because Aspen and CBS both requested declaratory rulings by the Commission, they are the only formal parties before the Commission. DNC and MAP have, therefore, filed informal comments in opposition to the views of Aspen and CBS. The Commission has fully considered the arguments advanced in all those comments in reaching its determination.

that it was based on a report of a bill which was not enacted into law. The bill discussed in the August 6 House Report did indeed require that appearances by candidates must be "incidental to" another event—and this requirement was explicitly set forth in the bill. The bill as enacted, however, did not limit the exemption to appearances of candidates which were "incidental to" other news. During the floor debate in the House, Rep. Bennett of Michigan warned the House that the "incidental to" language must be deleted or the bill would not work, citing the text of the bill and the language of the House Committee report, 105 Cong. Rec. 16241. That language was stricken in conference, and in floor discussion of the conference report Bennett again took the floor to comment on the deletion of the provision: "I am glad to see that the conference substitute omits this language because the majority of conferees felt as I do, that this requirement would lead to even greater confusion than we have at present." 105 Cong. Rec. 17778. The conference bill was then adopted.[9] The rejection by a legislature of a specific provision contained in a reported bill militates against an interpretation of the resulting statute which, in effect, includes that provision. See *Carey* v. *Donohue*, 240 U.S. 430 (1916).

23. Thus, the Commission's conclusion, in *The Goodwill Station Inc.*, that a program which might otherwise be exempt should lose its exemption because the appearance of a candidate is a central aspect of the presentation, is not supported by the legislative history.[10] News-

[9] Rep. Moss, who drafted the "incidental to" language, dissented from the conference report and during floor debate circulated a letter detailing his reasons. Chairman Harris, the floor manager, responded as follows:

> The letter alleges that this change replaces "the objective requirement of the House's bill that the appearance be incidental to the reporting of news with the subjective test that the newscast or news interview be bona fide." It states that the conference substitute provides for "a purely subjective test (sic) almost impossible of proof without either the showing of the grossest kind of favoritism or of a long pattern of preferential treatment by the broadcaster"....

He replied to this allegation:

> *The test to be applied under the conference substitute is by no means too subjective to permit this.*

Continuing, he stated the sentence quoted by the Commission in the NBC opinion:

> . . . and appearance of a candidate in on-the-spot coverage of news events is not to be exempt from the equal time requirement unless the program covers bona fide news events.

He continued, in a passage *not* quoted by the Commission:

> This requirement regarding the bona fide nature of the newscast, news interview or news events, was not included without thoughtful consideration by the conference committee. It sets up a test which leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks. However, it is not intended that the exemption shall apply where such judgment is not exercised in good faith. For example, to state a rather extreme case, the exemption from section 315(a) would not apply where the program, although it may be contrived to have the appearance or give the impression of being a newscast, news interview, or on-the-spot coverage of news events, is not presented as such by the broadcaster, but in reality has for its purpose the promotion of the political fortunes of the candidate making an appearance thereon. 105 Cong. Rec. 17782.

Thus, Chairman Harris equated the test as to bona fide in 315(a)(4) to those for "newscasts and news interviews." This statement conflicts with the Commission's 1962 ruling which, as described herein, mistakenly interprets the exemption as if the "incidental to" language had been retained.

[10] The Commission appears to have been confused by the legislative history in its 1962 interpretation of the test as to what constituted a bona fide news event under Section 315(a)(4). This confusion resulted in part from the language of the *Conference Report*, p. 4. The Report discussed the test for "bona fide" news interview, specifying that in addition to certain format requirements, "the determination must have been made by the station or network, as the case may be, in the exercise of its 'bona fide' news judgment and not for the political advantage of a candidate for public office." However, in specifying the "bona fide" test as applied to on-the-spot coverage of bona fide news events, the Report said:

> In the Conference substitute, in referring to the on-the-spot coverage of news events, the expression "bona fide news events" instead of "news events" is used to emphasize the intention to limit the exemptions from the equal time requirement to *cases where the appearance of the candidate is not designed to serve the political advantage of that candidate.*

The lack of parallel mention of the broadcaster's bona fide news judgment in that paragraph may well have led the Commission, in 1962, to conclude that when Chairman Harris

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casts, news interviews, news documentaries and "on-the-spot coverage" of news events were exempted in order to foster public consideration of major candidates while assuring minor candidates access to reasonable opportunities for air time.[11] The Commission's mandate was to devise standards to insure that these guidelines were enforced. There is no indication that Congress intended the Commission to take an unduly restrictive approach which would discourage news coverage of political activities of candidates. Rather, Congress intended that the Commission would determine whether the broadcaster had in such cases made reasonable *news judgments* as to the newsworthiness of certain events and of individual candidacies and had afforded major candidates broadcast coverage. Conference Report, H. Rep. No. 1069, 86th Cong. 1st Sess. In some circumstances this might logically entail exclusion of certain programs from within an exemption, such as programs designed for the specific advantage of a candidate, or those which were patently not *bona fide* news. It would not in our view extend to a restrictive application as to certain *categories* of events simply because the candidate's appearance is the central aspect of the event. Accordingly, a program which might otherwise be exempt does not lose its exempt status because the appearance of a candidate is a central aspect of the presentation, and not incidental to another news event.

24. *In the Goodwill Station, Inc.*, the Commission concluded that, since there was no special exemption for debates, these events could not attain exempt status merely by being presented under one of the four exempt formats provided for in the 1959 amendments. This conclusion is unfounded. No appearance of a candidate (in a debate or otherwise) has a special exemption independent of the 1959 provisions, but such events may be properly covered, for example, under the exemption provided for bona fide newscasts. During the House of Representatives floor debate, Congressman Harris noted that a number of important program categories were not specifically exempted from Section 315, but then he made the following observation:

> On the other hand, and I want you to get this, . . . the elimination of these categories by the committee was not intended to exclude any of these programs if they can be properly considered to be newscasts or on-the-spot coverage of news events.

105 Cong. Rec. 16229 (August 18, 1959). This view is consistent with the legislative history as to the other news exemptions as well.

25. The Commission, in 1962, stated that its restrictive interpretation of the exemptions (at least as it affected debates) was strength-

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stated that in order to be exempt the program must cover "bona fide events," he meant that the broadcaster's news judgment was not to be considered. However, Congress recognized that the appearance of a candidate at any event would, objectively, serve his political interest. Furthermore, the language of the exemption, "including but not limited to political conventions and activities incidental thereto" indicates that the exemption does not limit broadcasters only to the coverage of non-partisan or non political events. Thus, it is hard to see how the appearance of a candidate at a political convention is not intended to serve the candidate's advantage. Therefore, we believe that the question of what is a "bona fide event" cannot be answered by looking only at the event itself, because if that interpretation were to be given effect, no political event could be covered except the most innocuous ribbon-cutting ceremony. Even then, the broadcaster would be forced to inquire whether the politician's subjective motive for attending was his political advancement. The real question is as to intent—and it is clear here that Congress was naturally focusing on the broadcaster's role.

[11] Sen. Rep. No. 562, 86th Cong. 1st Sess., at p. 10; 105 Cong. Rec. 14445 (1959) (remarks of Sen. Pastore); 106 Cong. Rec. 13424 (1960) (remarks of Senator Pastore). See *Lawrence M. C. Smith*, 40 FCC 549 (1963); *Dr. Benjamin Spock*, 38 FCC 2d 316 (1972).

ened by the fact that Congress enacted special legislation in 1960 to exempt the Great Debates. We do not believe that Congress meant that debates presented within an exempt format would somehow lose their exemption. Indeed, the 1960 legislation had no special relevance to the coverage of debates. The legislation was intended to apply to *any* appearance by the presidential candidates regardless of format; and the measure was adopted prior to the time when the candidates and the networks proposed the Great Debates. Senator Yarborough offered an amendment which would have limited the exemption to debates, but this amendment was withdrawn. See 106 Cong. Rec. 13423–13428 (June 27, 1960).

26. Why then was the 1960 legislation needed if debates could be carried as on-the-spot coverage of a bona fide news event? It was hoped that the exemptions would "lead to a fuller and more meaningful news coverage of the actions and appearances of legally qualified candidates"; but the Congress recognized that by 1960 not enough time had elapsed "for a full evaluation of this amendment." Sen. Rep. No. 1539, 86th Cong., 2d Sess., p. 2 (1960). As we have already noted, the Congress fully expected the Commission to act to explain fully the scope of the 1959 amendments. At the time of the adoption of the 1960 legislation, however, the Commission had done little to clarify the meaning of the exemptions. The urgent necessity for Congressional action, as stated by Senator Pastore in his remarks of June 27, 1960, was that:

> (1) "Not enough time has elapsed to permit full evaluation [by the FCC] of [the 1959] amendment; and (2) "As the 1960 presidential and vice-presidential campaign approached, great concern had been expressed about the serious limitations that were involved in the full application of section 315 to such candidates." 106 Cong. Rec. 13424 (daily ed.).

Thus, it was suggested by broadcasters and agreed to by Congress that Section 315 would be suspended as to major Presidential and Vice Presidential candidates for the 1960 elections, to insure that "adequate free time would be offered voluntarily" by the networks. 105 Cong. Rec. 13424 (June 27, 1960). Thus, reliance by the Commission on the proposition that the 1960 Suspension assumed that a debate was not an exempt format was, and is, misplaced.

27. Furthermore, we are convinced that as a matter of policy the Commission's reversal of these prior decisions comports with the original legislative intent and serves the public interest by allowing broadcasters to make a fuller and more effective contribution to an informed electorate.[12] As Aspen points out in its petition, "[t]he consequence of these [1962] rulings has been to greatly diminish the efficacy of the on-the-spot news exemption, and thus the broadcaster's coverage of political news events," (Petition, p. 5) [13] rather than "to

[12] Although, our ruling is most directly necessitated by the canon which requires an administrative agency to heed guidelines established by Congress, and to correct clear legal errors which were material to decisional results, we also agree with petitioner's argument that post-1960 developments in the law which support First Amendment interests of the public to view political news and to receive "wide-open, uninhibited and robust debate." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), are consistent with Congress's intent in enacting the 1959 Amendments.

[13] Sen. Rep. No. 562, *supra*, at 10: "An informed public is indispensable for the continuance of an alert and knowledgeable democratic society. The public should not be deprived of the benefits that flow from this dynamic form of communications during the critical times of a political campaign . . ."

make it possible to cover the political news to the fullest degree . . ." and "to give full and meaningful coverage to the significant events of the day." [14] By departing from these prior opinions, we can aid the broadcaster in rendering a most unique public service—bringing a political debate "live into the homes of every interested voter."

28. However, we must advert to the legal arguments raised by the Commission in 1962 rulings as to the difficulties posed by loosening the exemptions to Section 315.

(a) It has been argued that giving Section 315(a)(4) a broader construction would render meaningless the other three exemptions to Section 315. By applying our Declaratory Order here to the circumstances covered by the two cases overruled,[15] we believe we have preserved the essential nature of the exemption. However, to the extent appearances in debates would fall within another exemption, e.g., newscast or news interview, quite obviously that argument is vitated.

(b) As to the argument that a broader construction would render meaningless the 1960 suspension, S.J. Res. 207, P.L. 86–677, that is of little relevance. As we have pointed out in some detail, Congress acted in 1960 [16] because it was uncertain how the Commission would interpret the 1959 Amendments and in order to facilitate the offer by the networks of free broadcast time to the major Presidential and Vice-Presidential candidates. Furthermore, the 1960 exemption did not specify a debate format at all; rather, it provided that *free time* could be offered by broadcasters for the candidate's use, without subjecting broadcasters to the equal time requirements.

(c) It is also suggested that the broader construction of the exemption would permit the broadcaster to ignore the equal time requirement. Thus, it is said, the opportunity to characterize as "newsworthy" *any* event covered live and on-the-spot would be irresistible to a broadcaster bent upon aiding a particular candidate in a partisan, discriminatory fashion. This argument is answered in part by the fact that we have limited our action on the 315(a)(4) exemption to the circumstances of *Goodwill Station*, *NBC* and *CBS*. This limited holding does not offer the opportunity for broadcaster abuse that already exists in the "newscast" or "new interview" exemptions. Nor does the narrow exemption reviewed here threaten to swallow the equal time rule. Realistically, the likelihood of broadcaster abuse is remote in coverage of more prominent political races (President, Senator, Governor, etc.). While the opportunity for abuse may exist at the less visible political office level (e.g., councilman, school board, district legislative races), we feel that the absence of abuse in the past 15 years of a broad newscast exemption fails to support the doomsayers' thesis—that this narrower exemption will be abused.

[14] Remarks of Senator Pastore, 105 Cong. Rec. 14445 (1959) and 106 Cong. Rec. 13424 (1960).

[15] See paragraphs 10–11, *supra*.

[16] We are aware that Congressional legislation is proposed which would exempt major Presidential and Vice Presidential candidates from the provisions of Section 315 altogether. The Commission has previously proposed to limit the equal opportunities requirement to major party candidates or candidates with "significant public support." See *First Report*, *supra* at 51–52 (para. 35). We do not contemplate that this Declaratory Order will obviate the need for more sweeping action by Congress.

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29. Most importantly, we believe that when Congress adopted the 1959 Amendments it squarely faced the risks of political favoritism by broadcasters which might be created by the exemptions—and, on balance, Congress preferred to make available to broadcasters the opportunity "to cover the political news to the fullest degree." [17] Today, these risks are substantially lessened.[18] Yet, the Commission's failure to accord the appearances in *Goodwill* and *Wyckoff* the exemption of Section 315(a)(4) did not give adequate scope to the Congressional action; rather, the Commission took a more cautious position which would insure that the threat of abuse would never materialize. To do so merely to preserve administrative convenience is not an appropriate course on which we will continue.

Press Conferences: The CBS Petition

30. The preceding discussion of the Section 315(a)(4) exemption as it pertains to coverage of debates is also relevant to the question of live coverage of a press conference. As we stated in paragraph 23, *supra*:

> . . . [A] program which might otherwise be exempt does not lose its exempt status because the appearance of the candidate is a central aspect of the presentation, and not incidental to another news event.

Under this test, press conferences do not lose their exemption merely because the candidate's appearance is the central aspect of the news event. The Commission allows reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to eligibility for Section 315 exemption to their reasonable good faith judgment. *See United Community Campaigns of America*, 40 FCC 390, 391 (1964). Congress intended that the Commission would determine whether the broadcaster had made reasonable and good faith judgments as to the newsworthiness of certain events and of individual candidacies, and had afforded major candidates broadcast coverage. See *Conference Report*, H. Rep. No. 1069, 86th Cong. 1st Sess. CBS's premise is that its judgment as to the newsworthiness of such press conferences, and its consequent decision to afford such conferences live broadcast coverage, are *necessarily* wholly determinative of whether such broadcasts are exempt under Section 315(a)(4). However, newsworthiness is not the sole criterion to be used in determining whether Section 315(a)(4) has been properly invoked. A question whether the coverage of a press conference was intended by the broadcaster to be for the specific advantage of that candidate would be considered in terms of the licensee's good faith in deciding to cover the press conference. See 105 Cong. Rec. 17782 (remarks of Oren Harris).

31. With respect to CBS's contention that a Presidential press conference constitutes a "bona fide news interview," within the meaning of Section 315(a)(2), we cannot agree with the claim that our perspective in evaluating the criteria for exemption under that subsection has been too narrow. The Conference Report on the bill con-

[17] 105 Cong. Rec. 14444 (remarks of Sen. Magnuson).

[18] Aspen correctly notes that when Congress faced those risks, the fairness doctrine was enforced through the renewal process. Thus, a misuse of an exemption could not be corrected during the critical days of the political campaign. See 105 Cong. Rec. 17782 (remarks of Chairman Harris) (September 2, 1959). Since then, however, additional protection has been afforded candidates through prompt consideration of fairness and Section 315 complaints.

taining the exemptions to Section 315(a) set forth the criteria for exemption under subsection (a)(2) with clarity:

> The intention of the committee of conference is that in order to be considered "bona fide" a news interview must be a regularly scheduled program.
>
> It is intended that in order for a news interview to be considered "bona fide" the content and format thereof, and the participants, must be determined by the licensee in the case of a news interview originating with the licensee of a station and by the network in the case of a news interview originating with a network; and the determination must have been made by the station or network, as the case may be, in the exercise of its "bona fide" news judgment and not for the political advantage of the candidate for public office. H. Rept. No. 1069, 86th Cong., 1st Sess. 4 (1959).

Moreover, Senator Pastore, Senate Manager of the bill, stated:

> We have spelled out in the House Report itself precisely what we mean by bona fide news interview. It is provided, specifically, first of all, that it shall be a regularly scheduled program. Secondly, the content and format must be exclusively under the jurisdiction of the broadcaster or of the network. 105 Cong. Rec. 17829 (September 3, 1959).

32. The legislative history makes it clear that "regularly scheduled" meant to Congress a program which a licensee or network initiates and schedules for regular, recurrent broadcast, rather than a program which covers an event (such as a press conference) which, although possibly "recurrent in the normal and usual course of events," is initiated by a candidate and takes place and is broadcast only at such times and with such frequency as the candidate may specify. *See* 105 Cong. Rec. 16224–5 (August 18, 1959) (remarks of Representative Brown of Ohio). The legislative history refers to such programs as "Meet the Press", "Face the Nation" and "College Press Conference" as examples of the type of "regularly scheduled" news interview program contemplated for exemption. *See, e.g.*, 105 Cong. Rec. 16224–5 (August 18, 1959) (remarks of Representative Brown of Ohio); 105 Cong. Rec. 17829 (September 3, 1959) (remarks of Senators Engle and Pastore); *id.* at 17831 (remarks of Senator Scott). "Regularly scheduled" programs were thus thought to be those scheduled by a licensee or network for broadcast . . . say every day at a certain time or every week at a certain time . . ." 105 Cong. Rec. 17780 (September 2, 1959) (remarks of Representative Harris). The legislative history does not support the view that the term "regularly scheduled" encompasses broadcasts of press conferences called by a candidate solely at his discretion and at such times and with such regularity as only he may specify. In light of the foregoing, we are unable to accept CBS's suggestion that we construe the term "regularly scheduled" as meaning "recurrent in the normal and usual course of events."

33. As to the "control over content and format" aspect of the test for exemption under Section 315(a)(2), the legislative history unequivocally mandates that such control ". . . must be exclusively under the jurisdiction of the broadcaster or of the network." 105 Cong. Rec. 17829 (September 3, 1959) (remarks of Senator Pastore). Specifically, ". . . the content and format . . . [of the news interview program] . . ., and the participants, must be determined by the licensee in the case of a news interview originating with the licensee of a station and by the network in the case of a news interview originating with a network . . . ." H. Rept. No. 1069, 4. We are unwilling to impose on this plain language the strained interpretation that CBS suggests, *viz.*, that as

long as the control over most of a news interview program is out of the hands of a candidate the "control" criterion for exemption is satisfied.

34. In view of the fact that the broadcasts of such conferences are not "regularly scheduled," within the Congressionally contemplated meaning of that term, we reaffirm our view that the broadcast coverage of Presidential press conferences is not exempt as a "bona fide news interview," within the meaning of Section 315(a)(2). We are not persuaded to alter this conclusion by the network's claim that Congressional concern with respect to news interview programs was primarily directed at the danger of such programs being "rigged" by some broadcaster at the local level to further the candidacy of a local candidate. The fact that there was concern with regard to locally originated broadcasts does not necessarily imply that Congress intended that a more permissive standard for exemption under Section 315(a)(2) be used in connection with nationwide broadcasts, as CBS seems to suggest. Rather, the discussion of the danger of local broadcaster "rigging" of news interview programs appears in the legislative history merely as explanation for the need to include the words "bona fide" in the formulation of the subsection (a)(2) exemption. See 105 Cong. Rec. 17778 (September 2, 1959) (remarks of Representative Harris); 105 Cong. Rec. 17831 (September 3, 1959) (remarks of Senator Scott).

35. CBS errs when it states that "other Republican candidates may annouce their candidacies within seven days of the press conference and demand "equal time." (Petition, p. 2 n. 1). Candidates seeking equal opportunities must have become legally qualified prior to the "use" in order to properly obtain the right provided by the statute. See, e.g., 47 C.F.R. §§ 73.120(e), 73.657(e). Moreover, an early declaration of candidacy is irrelevant to whether or not news coverage of the candidate is exempt under Section 315. Although we recognize that the equal opportunity requirement offers a disincentive to live coverage of appearances by candidates, particularly in such a situation, we could not for that reason alone alter our prior rulings if the legislative history of Congressional intent indicated otherwise.

36. DNC argues that the continued effectiveness of Section 315 depends on its precise, indeed "mathematical" operation. Equal opportunity is required by law only after it is determined that a prior, nonexempt "use" has been made on a broadcast. Congress clearly intended that the Commission had ongoing authority to issue interpretive rulings and across-the-board rules to effectuate Section 315 exemptions. See H. Rep. No. 1069, 86th Cong., 1st Sess. 12, 13 (1959). Equal opportunity still is required when a "use" has been made. The rule will operate as precisely after this decision as before. Indeed, it will operate with greater clarity, and in accord with legislative intent. With respect to DNC's argument that Section 315 vested in candidates a right to broadcast after a Section 315 "use", we point out that Congress modified that right in 1959. At that time, it instructed the Commission to implement this modification. We have determined that the Commission, in 1962, misinterpreted Congressional intent, the result of which was an unsupported construction of the Section 315(a)(4) exemption. In this decision, we have sought to remedy that error of law. The "automatic and mathematical" precision described by DNC, *viz.*, an un-

warranted narrow construction, was perhaps more convenient to administer. However, strict limits on the exemption cannot be justified if they undermine legislative intent.

37. DNC's assertion that "irreparable harm" will result to its 1976 candidate, or any candidate opposing an incumbent President, from live broadcast coverage of a Presidential press conference is speculative and conclusory. Free-wheeling, wide-open press conferences do not necessarily yield the kind of favorable publicity for the holder which DNC too easily assumes. Most of all, however, we believe that the intent of Congress was to pursue the "right of the public to be informed through broadcasts of political events." *Supra*, para. 8. The fundamental concept which underscores this objective is that the continued vitality of a democratic society and its freedoms requires the "widest possible dissemination of information," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and that the broadcasters' role is to insure "that the American public must not be left uninformed." *Green v. FCC*, 447 F. 2d 323, 329 (1973). We must always keep in mind that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). We believe that the public's interest in "uninhibited, robust, wide-open" debate on public issues far outweighs the imagined advantages or disadvantages to a particular candidate. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

38. We reject the network's suggestion that we distinguish between press conferences called by an incumbent candidate in his official capacity and those called in furtherance of his candidacy. Such an approach would, necessarily, place the Commission in the position of deciding, in each case, whether the appearance of the official is political or non-political. We have steadfastly eschewed making such determinations, because to draw such distinctions would require us to make subjective judgments concerning the content, context and potential political impact of a candidate's appearance. See *Paulsen v. FCC*, 491 F. 2d 887, 890–91 (9th Cir. 1974).[19]

39. Finally, we reject the suggestion by CBS that, in determining whether press conferences are exempt, we consider the unique status of the Presidency and the inherent newsworthiness of Presidential communications with the public. It must be recognized that, although, it is reasonable to conclude that the President's unique status as Chief Executive makes his communications relative to major national and international events inherently newsworthy, it is equally as reasonable to conclude that, in any given state in the country, the Governor's unique status as chief executive of that state may well make similar communications concerning that state newsworthy for its citizens. In our view there is no rational distinction to be made between press conferences at one level or another, since no such distinction can be found within the legislative history of the 1959 Amendments, nor are there any persuasive indications that the Congress intended to distinguish between press conferences exempt at one level and those at another level of political offices which would not be exempt. Thus, routine presidential press conferences, as well as press conferences by

[19] The Commission reviews only whether or not the broadcaster intends to promote the interest of a particular candidate in presenting coverage of a news event. *Supra*, paras. 22–26 and footnote 9 therein.

governors, mayors, and, indeed, any candidates whose press conferences are considered newsworthy and subject to on-the-spot coverage may be exempt from Section 315 under our interpretation.

40. Thus, for the reasons stated above, we today announce that in the future we will not follow our 1962 decisions in *The Goodwill Station, Inc.*, and *National Broadcasting Co.* (*Wyckoff*), and we will thus permit on-the-spot coverage of appearances by candidates in the circumstances covered by those cases. See para. 10–11, *supra*. We also announce that we will no longer follow our 1964 *CBS* decision to the extent that it denies an exemption under Section 315(a)(4), for coverage of a press conference by a candidate for public office.[20] As we said above, the undue stifling of broadcast coverage of news events involving candidates for public office has been unfortunate, and we believe this remedy will go a long way toward ameliorating the paucity of coverage accorded these news events during the past fifteen years.

41. Accordingly, IT IS ORDERED, That the petitions of the Aspen Institute Program on Communications and Society and of CBS, Inc., ARE GRANTED IN PART and DENIED IN PART, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

In a declaratory ruling, the majority has made a major policy change in its interpretation of what constitutes "on-the-spot coverage of bona fide news events" pursuant to Section 315(a)(4) of the Communications Act of 1934, as amended. The reason given for this significant decision is that the three cases defining Commission policy since the early 1960's were based upon an error in the legal interpretation of Congress' intent in amending Section 315 in 1959.[1]

[20] We believe that MAP's contention that we may not accomplish this end through declaratory relief, *supra*, para. 20, to be without merit. Although the Commission may not adopt an interpretation which is inconsistent with a statutory term, it has freedom within the guidelines established to interpret the statute in light of its greater expertise. *Cf. American Broadcasting Co.* v. *United States*, 110 F. Supp 374 (EDNY), aff'd 347 U.S. 284 (1953). Furthermore, a regulatory agency is not wedded to its past decisions. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). When faced with new developments, or on further consideration of a policy, an agency may alter its past rulings and policies. *American Trucking Ass'n* v. *A.T. & S.F. RR. Co.*, 387 U.S. 397, 416 (1967). When it reverses course, however, the agency must provide "an opinion or analysis indicating that the standard is being changed and not ignored and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F. 2d 1018, 1026 (D.C. Cir. 1971). We have squarely confronted both the legal and policy issues specifically involved, and have articulated our reasons for the change. The choice between rule-making and adjudicative decisionmaking is largely one of agency discretion. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290–295 (1974); *S.E.C.* v. *Chenery Corp.* 332 U.S. 194, 202 (1947). Declaratory relief, in the form of an advisory ruling, is appropriate where, as here, the controversy concerns the correctness of a Commission's interpretation of law. As we point out herein, the Commission's decisions in 1962 and 1964 as to the "on-the-spot coverage of bona-fide news event relied upon a mistaken interpretation of law. See para. 22–26 herein. This error of law cannot stand as the proper view in the future. Thus, prompt prospective application of new policy, which is entailed by correction of legal error is properly within the context of a declaratory ruling. *Cf. N.L.R.B.* v. *Majestic Weaving Co.*, 335 F. 2d 854, 860 (2d Cir. 1966). Furthermore, this action is consistent with Congress's intent that the Commission had ongoing authority to make decisions on a case-by-case basis or by rules in interpreting the exemptions. See Sen. Rep. No. 562, 86th Cong., 1st Sess. 12, 13 (1959); *Cf. N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). We believe our rulings will resolve these legal issues well in advance of the 1976 election year, are essential to promote the purposes of the 1959 Amendments to Section 315, and will clarify their interpretation for candidates, licensees, and the Commission staff. Hence, we are not persuaded that our discretion to issue declaratory orders is so limited.

[1] *The Goodwill Station, Inc.*, 40 F.C.C. 362 (1962); *National Broadcasting Co.*, 40 F.C.C. 370 (1962); *Columbia Broadcasting System, Inc.*, 40 F.C.C. 395 (1964).

That there was legal error in deciding *Goodwill, NBC* (*Wyekoff*), and *Columbia Broadcasting System, Inc.*, is far from clear. What is clear to me is that the majority has sidestepped the very purpose of Section 315 of the Communications Act—that all qualified candidates for a public office be given equal opportunities to present their images and positions to the voters via broadcast media. With the legal interpretation adopted today, the Commission has created a loophole to Congress' intent that allows grossly unbalanced coverage of the political activities of political opponents, so long as the political activities are covered live and in full. Pursuant to the legal interpretation adopted today, a broadcaster may determine that only major candidates are newsworthy and, while covering their debates and press conferences, may ignore similar appearances of other candidates.

A change in policy of this magnitude affects the heart of our political system. At a minimum, it should be made in the context of a rule-making proceeding where guidelines for broadcaster judgement can be considered. The preferable procedure, however, is to let Congress define the policy. During my tenure at the Commission, we have repeatedly told Congress that we are responsible for communications matters, not political decisions. I feel that this role should be preserved.

I dissent.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

(In Re Section 315 (Political Equal Time))

The Commission is making a tragic mistake.[1] In an ill-considered rush, the majority has swept aside the clear intent of a vital portion of Section 315 [2] which was enacted by Congress to ensure that all political Candidates were given media equality with all humanly reasonable exactitude. By exempting two popular forms of political weaponry, the press conference and the debate, the delicate balance of egalitarian precepts underlying political "equal time" legislated into Section 315 and refined over 15 years of consistent administrative and judicial construction, has suffered a severe and, perhaps, mortal blow. I dissent.

Although the reversal of the principal cases holding that press conferences and debates of political candidates triggered the statutory "equal time" mechanism [3] is superficially narrow as expressly treated in the *Majority Order*, the irresistable consequence of our action effectively renders nugatory § 315(a)(4). By necessary implication, our ruling cannot be limited to the coincidental facts of the pivotal cases (fn. 3); and, ultimately, all manner of possibly preferential broadcast coverage [4] under the guise of "bona fide news events" is the undeniable result of our decision herein.

[1] Lest anyone think otherwise, it is my view that the mistake is non-partisan as the vote in this action tends to affirm. However, as any casual student of politics knows, mistake carries no party label and this action demonstrates that Democrats and Republicans can be wrong at once. (In passing, a good reason—I should think—to guaranty that *all* candidates of *all* persuasions receive equal time.)

[2] 47 U.S.C. § 315(a)(4) which permits an exemption to equal time for "on-the-spot coverage of bona fide news events. . . ."

[3] *See The Goodwill Station, Inc.*, 40 F.C.C. 362 (1962); *National Broadcasting Co.*, 40 F.C.C. 370 (1962); *Columbia Broadcasting System, Inc.*, 40 F.C.C. 395 (1964).

[4] In case anyone thinks the possibility of candidate favoritism is not an omnipresent threat, *see Star Stations of Indiana, Inc.*, 51 FCC 2d 95 (1975) (Hooks not participating), appeals pending, D.C. Cir. Case Nos. 75–1203, 75–1204, 75–1205. The *Star* decision and *Initial Decision* (51 FCC 2d at 114) are rife with instances of a broadcaster agonizing to find ways to favor particular candidates with broadcast coverage. How much more simple, and legal, it would have been had the loophole we now fashion been in effect.

The policy decision engendering the renunciation of our well reasoned inclusion of press conferences and debates (cogently set forth in the fn. 3 cases) is based on the expressed desire of the majority to provide fuller broadcast coverage of the activities of political candidates, unencumbered by Section 315 requirements for opponent equal time. However, I do not consider either a debate or press conference to be the type of spontaneous, apolitical occurrence Congress regarded as a conventional news event. Both, and particularly debates, are a species of quasi-news used as potent devices for the promulgation of the claims of a political candidate in the course of an election; they are staged, structured and premeditated campaign tools imparting very little of news value which cannot now be broadcast within a "bona fide newscast" where such news is already exempt under § 315(a)(1). Indeed, both are unlikely vehicles for the formation of hard news. For example, if an official must transmit critical information to the citizenry, there is no assurance in a news conference that questions relating to the critical issue will even be asked. Nor does a news conference provide the opportunity for the sort of extended and well considered response one expects to accompany official reaction to a critical event.[5] Political debates, on the other hand, are hard to imagine as fast-developing news exigencies, since they are ordinarily scheduled long in advance, with partisan hype and hoopla, and the issues in a debate are framed and restricted by the disposition of the participants. Moreover, and most important from the standpoint of assuring at least a modicum of coverage equality, a candidate not invited to participate in a debate is at a *double* disadvantage; not only does the uninvited candidate miss the exposure and opportunity provided by participation in the debate itself, our ruling today means that the uninvited candidate is not entitled to *any* other time to compensate for opponent appearances on debate. The spirit of § 315, ergo, has been separated from the body.

To ask the rhetorical question "if a Presidential press conference or a majority party candidate debate is not, of itself, a 'bona fide news event,' what is" begs the issue. The real issue, given our reconstruction, is "what, then, involving important elections, is not news." [6] That is why I said earlier that the inevitable byproduct of this reversal is nullification of the carefully circumscribed, intentionally limited provisions of Subsections 315(a)(1)–315(a)(3).

That such provisions have been neutralized by our ruling today requires only simple development. On its face, our ruling exempts only press conferences and debates fitting the factual settings of *Goodwill*, *NBC*, and *CBS* (fn. 3, *supra*).[7] A strict reversal on indigenous facts legally means that a press conference or a debate may only be covered

[5] The need of an elected official to report to the public on urgent developments has been recognized and provided for by Commission precedent. *See, Republican National Committee*, 40 FCC 408 (1964), *aff'd by an equally divided Court sub nom., Goldwater v. FCC*, No. 18, 963 (D.C. Cir., Oct. 27, 1964) (*per curiam*), *cert. denied*, 379 U.S. 893 (1964).

[6] News is dictionary defined as "reports, collectively, of recent happenings, *especially those broadcast over radio or TV*. . . ." Webster's New World Dictionary of the American Language (2nd College Ed. 1972). This self-definition syndrone of broadcast news is, obviously, a condition requiring a narrow reading of the statute so as not to render the "news event" exemption meaningless.

[7] Even this limitation is not strictly true, since the *Order* itself goes beyond the facts in *CBS* which involved a Presidential press conference. Today's ruling concedes the impossibility of limiting exemptions to Presidents and, *sua sponte*, exempts governors and mayors as well. Even this limitation is tenuous at best.

if it is (a) broadcast live; (b) in its entirety; (c) not sponsored or controlled by the broadcaster; and (4) not rigged by the broadcast and/or candidate.

Inasmuch as ninety-nine percent of the usual news broadcast is of taped excerpts, the "live" and "entirety" limitations have no plausible relationship to the question of "on-the-spot coverage of bona fide news events." § 315(a)(4). These two distinctions are so patently meritless as to make further comment practically unnecessary. If "bona fide news events" are only those covered live and in totality, then there is no such thing as broadcast news currently available. The requirement that the event not be arranged or controlled by the broadcaster (and outside of a studio) is similarly artificial distinction because broadcast of any event requires close cooperation between a broadcaster and participants. Stage direction comes close to control or arrangement.[8] And, finally, whether or not coverage is rigged or preference is being afforded one or more candidates relates to the *bona fides* of the broadcaster. This is a matter of intent and objective proof of favoritism is all but impossible.[9]

Hence, stripped of the foregoing irrelevant distinctions (which, like oak leaves in October, must fall), the remaining test for exempt coverage of debates and press conferences will come to depend on the subjective newsworthiness judgment of a licensee. Indeed, if logic and reasoned policy play any part in our decisional processes, and if the purpose of our policy reversal is to facilitate broadcast coverage of the utterings and activities of political candidates, how can we consistently limit the exemption to debates and press conferences? Is a policy statement, opinion or other activity of a major candidate any less newsworthy or entitled to coverage because it transpires in a format other than a debate or press conference? If the gravamen is the transmittal of substance to the populace, a statement delivered from a soap box in Times Square—from a legal and policy aspect—is equally deserving of a 315(a)(4) exemption.

We, therefore, have interpreted § 315(a) into oblivion. That is why our past interpretation requiring the happenstance of a "bona fide news event" extrinsic to the candidate or the political message was imperative to impart any legislative meaning to § 315(a)(4). My view is supported by the statement of Chairman Oren Harris to the House of Representatives, noted at the adoption of 315(a): "appearance of a candidate in on-the-spot-coverage of news events is not to be exempt from the equal time requirements unless the program covers bona fide news events." See 40 FCC at 372–373.[10] It is abundantly clear that Congress saw the candidate appearance, *qua* appearance, and the "news event" as separate and distinct happenings unless it is assumed that Congressman Harris was talking in nonsensical circles. While Congress rejected the stipulation that an exempt candidate appearance must be "incidental to" a discretely newsworthy event, it is unreason-

[8] *See, e.g., Complaint Concerning the CBS Program, "The Selling of the Pentagon"* 30 FCC 2d 150 (1971); CBS *"Hunger in America"* 20 FCC 2d 143 (1969).

[9] *But compare, Star Stations of Indiana, Inc., supra* fn. 4.

[10] There are, of course, many other manifestations of Congressional intent, chief of which is the enactment of Subsection 315(a) itself when Congress did not delay at all when it felt the Commission had misconstrued the intent of § 315 in the *Lar Daly* case. The other obvious example is the enactment of Senate Joint Resolution 207 (P.L. 86–677) which specifically exempted Presidential debates in the 1960 Kennedy-Nixon election.

able to infer that Congress intended a naked candidate appearance on a debate, press conference or street corner to be the "news event" itself. If any unrigged candidate appearance is inherently newsworthy for purposes of a § 315(a)(4) exemption, then there is no equal time requirement for the broadcast coverage of opposing candidates save what a broadcaster decides is equally newsworthy. If newsworthiness is the operative test, then all the other carefully drafted 315(a) exemptions and protections are useless and unnecessary. Without being only "incidental to (or, fortuitously circumstantial to) uniquely newsworthy events, there are endless examples of when a candidate's appearance is entitled to a § 315(a)(4) exemption. And no better example can be found than that presented by a companion item to the instant ruling wherein a request was made to determine whether the President could be shown initiating the annual United Way charity drive, and which request the majority ironically rejected. Here is an illustration of an inherently newsworthy event (i.e., initiation of the drive) in which the President's appearance, while not merely "incidental" thereto, was in the context of a separate, apolitical, bona fide news event. Although the line is thin (as are many lines we walk, *e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967), we cannot eradicate by administrative fiat that line legislatively drawn by Congress. The curiosity of our two interpretive rulings is that a purely political event like a debate does not activate equal time whereas a purely apolitical, separately newsworthy appearance (*viz.*, United Way drive) does. *Non Sequitur.*

Because the effects of our action today are so sweeping and important, and whether or not our prior holdings were of such solidified general applicability as to require rule making for significant alteration, an Inquiry and Rule Making would have been helpful in resolving these issues. At least, I believe, it would have helped open our eyes to the drastic ramifications of our seemingly limited exemptions. The question as to whether, as a legal matter under the Administrative Procedure Act, such rule making is mandatory has been ably argued by all sides and the courts will eventually make that judgment.

Finally, our action here is in excess of necessity because if we wish to assure that licensees are not avoiding legitimate and important political issues because they are required to fairly treat candidate access, we are not powerless to act. A licensee has an affirmative duty "to provide a reasonable amount of time for the presentation . . . of public issues." *Report on Editorializing*, 13 FCC 1246, 1249 (1949).

The majority may no longer be pleased with the journalistic strictures set forth in § 315(a) but we cannot legally strain to interpret that statute so as to annul Congressional Acts.

While I do not doubt the motives of the majority in liberalizing political coverage, and as has been expressed in other ways, the road to Perdition bisects the crossroads of Noble Intention and Muddled Perception. We have taken the wrong fork.

Statement of Commissioner James H. Quello in Which Commissioner Robinson Joins

(Re Section 315)

The action taken by the majority was, I believe, consistent with Congressional intent, common sense and the public interest. There can be no doubt that the prior interpretation of Section 315(a)(4) was acting as a restraint on broadcast coverage of political candidates to the detriment of an informed populace. I refuse to accept the cynical view that incumbent congressmen preferred this limited coverage in their own self-interest.

I do not view this issue as a partisan political one in which one party or one candidate stands to gain or lose by our decision. Political debates—in the limited context in which they will now be exempt from equal time requirements—can only benefit the American people by making us all more aware of the candidates for political office and their stated views. The news conference, too, can serve to inform and educate without the artificial restraints imposed by government.

The direct coverage of an event—such as debates and news conferences—can present to those who will take the time to watch and listen, many of the subtleties and nuances which often escape the paraphrased reports we hear and read. Direct coverage—to my mind—is one of the unique qualities broadcasting brings to public service. It permits each of us to participate directly in the process of selecting our representatives by what they have to say and how they say it, based upon our own analysis. It helps us to better weigh a candidate's qualifications for office according to our own criteria. Journalistic analysis and commentary, too, are important to our understanding. But, such analysis takes on added value when it is compared with the actual event. Therefore, I believe that a better informed American public is an inevitable consequence of our action.

An added benefit to the listening and viewing public is that our action today has removed the restraints from coverage of all political contests, state and local, as well as Federal. For those who believe that broadcast coverage of political events will hereafter be limited to only major party candidates, I hasten to point out that the Fairness Doctrine remains unaffected. Consistent with the Doctrine, I fully expect that all candidates for political office will be accorded a reasonable opportunity to present their views. I do not see our decision as limiting access to political candidates in any way. On the contrary, it is my hope—and my expectation—that broadcasting will now be better able to fulfill its public interest responsibility in covering political events.

STATEMENT OF COMMISSIONER ABBOTT WASHBURN ON TODAY'S ACTION ON APPLICATION OF SUBSECTION 315(a)(4) OF COMMUNICATIONS ACT

SEPTEMBER 25, 1975.

It is clear from the legislative record that it was the intent of Congress in 1959, by means of the "news exemptions" to the equal-time Section 315, to open up and facilitate broadcast coverage of political discussions and events in this country.

However, the Commission's narrow interpretations, in 1962 and 1964, of the Subsection 315(a)(4) exemption ("on-the-spot coverage of bona fide news events . . . including but not limited to political conventions") have had the opposite effect. They have effectively inhibited live on-the-spot coverage of debates between candidates and live coverage of Presidential news conferences.

Under the Subsection 315(a)(1) exemption, these same events may be, and are, covered in newscasts. Our action today, rescinding the 1962 and 1964 rulings, makes it possible for broadcasters to cover these events not just in newscasts but also live and in their entirety whenever these events are considered *bona fide* news.

The Bicentennial year should be a model of the fullest possible broadcast coverage of political activities for the benefit of the electorate.

SEPARATE STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I agree with Commissioner Quello's views on our re-interpretation of Section 315, but want to add a few additional thoughts of my own. First, as Commissioner Quello correctly emphasizes, the Commission's declaratory order is not a partisan political act; it is precisely what it purports to be—the rehabilitation of Section 315 by correcting an old and embarrassing mistake concerning its interpretation. Admitting mistakes is not something government agencies do often or promptly, but it should be a source of satisfaction that they do it at all.

Inasmuch as our action today corrects a mistake of law, I am clear that the agency is not obliged to go through a notice and comment rulemaking. As I have elsewhere expounded at length, the process of adjudication—and declaratory rulings belong to this genre of administrative action—is an appropriate vehicle for policy decisions such as this (particularly where, as here, the decision turns on purely legal issues—which, it is noted, were earlier decided by adjudication). See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970). The Supreme Court has made it clear that agencies have a very broad discretion to formulate and re-formulate policies outside the formal constraints of rulemaking. *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 289 (1974). Hence, today's action is as sound legally as it is sensible.

APPENDIX 2
OPINION OF COURT OF APPEALS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1951

THE HONORABLE SHIRLEY CHISHOLM, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

CBS, INC., AMERICAN BROADCASTING COMPANIES, INC., NATIONAL BROADCASTING COMPANY, INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, ET AL., INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INTERVENORS

No. 75-1994

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANY, INC., AND RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, INTERVENORS

Petitions for Review of an Order of the
Federal Communications Commission

Argued November 26, 1975

Decided April 12, 1976

Harvey J. Shulman, with whom Collot Guerard, was on the brief for petitioners in No. 75-1951.

Marcus Cohn, with whom *Robert N. Smith*, *Martin J. Gaynes* and *Sheldon S. Cohen* were on the brief for petitioner in No. 75-1994.

Werner K. Hartenberger, Deputy General Counsel, Federal Communications Commission, with whom *Ashton R. Hardy*, General Counsel, *Daniel M. Armstrong*, Acting Associate General Counsel, *Stephen A. Sharp*, Counsel, Federal Communications Commission. *B. Barry Grossman* and *Lee I. Waintraub*, Attorneys, Department of Justice, were on the brief for respondents.

Timothy B. Dyk, with whom *J. Roger Wollenberg* and *Daniel Marcus*, were on the brief for intervenor CBS Inc., *Joel Rosenbloom* and *Richard D. Paisner* also entered appearances for intervenor CBS Inc.

James A. McKenna, Jr., *Thomas N. Frohock* and *John J. Smith*, were on the brief for intervenor American Broadcasting Companies, Inc.

Corydon B. Dunham and *Howard Monderer* were on the brief for intervenor National Broadcasting Company, Inc.

J. Laurent Scharff, was on the brief for intervenor Radio Television News Directors Association.

Ellen Show Agress and *Earle K. Moore*, were on the brief for intervenor Office of Communication of the United Church of Christ, et al.

Henry Geller, filed a brief on behalf of Aspen Institute Program as *amicus curiae* urging affirmance.

Kenneth J. Guido, Jr., filed a brief on behalf of Common Cause as *amicus curiae* urging affirmance.

Stephen I. Schlossberg, entered an apearance for intervenor, International Union United Automobile, Aerospace and Agricultural Implement Workers of America.

Henry Geller, entered an appearance for the League of Women Voters of the United States as *amicus curiae*.

Before: WRIGHT, TAMM and WILKEY, *Circuit Judges*

Opinion for the court filed by *Circuit Judge* TAMM with whom *Circuit Judge* WILKEY concurs.

Dissenting opinion filed by *Circuit Judge* WRIGHT.

TAMM, *Circuit Judge*:

I. INTRODUCTION AND BACKGROUND

This case concerns perhaps the most important interpretation of the equal time provision of the Communications Act of 1934, 47 U.S.C. § 315(a),[1] which has arisen in the past decade. Petitioners, the Democratic National Committee ("DNC"), the National Organization for Women ("NOW"), and Representative Shirley Chisholm, ask us to review various aspects of a Memorandum Opinion and Order[2] of the Federal Communications Commission (hereinafter "FCC" or "Commission") reversing a statutory interpretation of over ten years' duration and

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[1] Section 315(a) of the Communications Act of 1934, Act of June 19, 1934, ch. 652, § 315, 48 Stat. 1088, was identical to Section 18 of the Radio Act of 1927, Act of February 23, 1927, ch. 169, § 18, 44 Stat. 1170.

[2] The ruling under review is set forth at 55 FCC 2d 697 (1975); J.A. 141 (hereinafter referred to as *Opinion*).

holding that, henceforth, debates between qualified political candidates initiated by nonbroadcast entities (non-studio debates) and candidates' press conferences will be exempt from the equal time requirements of Section 315, provided they are covered live, based upon the good faith determination of licensees that they are "bona fide news events"[3] worthy of presentation, and provided further that there is no evidence of broadcaster favoritism. Our review of the legislative history surrounding passage of the "bona fide news event" exemption reveals that it is inconclusive as to whether Congress intended for these particular formats to be included, although we find substantial support for the Commission's new interpretation in the broad Congressional policies behind passage of the exemption—increasing broadcaster discretion and encouraging greater coverage of political news—and in the discretion granted the Commission in interpreting and applying the amendment to particular program formats. We therefore defer to the Commission's interpretation of the Act it is charged with administering. We also conclude that the Commission has properly exercised its discretion in accomplishing the reversal via declaratory order rather than through notice and comment rulemaking.

A. *General Factual and Legislative Background*

Section 315, as originally enacted and interpreted, had imposed upon broadcasters a duty of absolute equality of treatment of competing political candidates in the "use" of broadcast facilities, stating:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of

[3] 47 U.S.C. § 315(a)(4) (1959).

> censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

47 U.S.C. § 315(a).

For a number of years the FCC interpreted the equal time provision as inapplicable to the appearance of a candidate on a newscast, reasoning that such an appearance did not constitute a "use" of the broadcast facility insofar as the candidate did not directly or indirectly initiate the filming or presentation of the event. *See, e.g., Allen H. Blondy*, 40 FCC 284, 14 P & F RADIO REG. 1199 (1957). This interpretation became embodied in the Commission's official release of October 6, 1958, entitled "Use of Broadcast Facilities by Candidates for Public Office." Public Notice FCC 58-936, III-12; 105 CONG. REC. 14459 (1959).

In 1959, however, the Commission effected a radical departure from its prior interpretation in the so-called "Lar Daly" case, *Columbia Broadcasting System (Lar Daly)*, 18 P & F RADIO REG. 238, *reconsideration denied*, 26 FCC 715, 18 P & F RADIO REG. 701 (1959), and interpreted the statute to mean that the equal time rule applied even to the appearance of a candidate on a regularly scheduled newscast.[4] The Commission's position on this matter created a national furor, and it was feared that its strict application of the equal opportunities provision "would tend to dry up meaningful radio and television coverage of political campaigns." S. REP. NO. 652, 86th Cong., 1st

[4] Daly, a perennial candidate in both the Republican and Democratic mayoralty primaries in Chicago, had complained that several stations presented newsclips showing the mayoralty candidates in the two primaries but refused to afford him equal time. The Commission ruled that the presentation of these filmclips constituted a "use" of the broadcast facility and, consequently, that Daly was entitled to equal time.

Sess. 10 (1959).[5] This concern led Congress to conclude that the concept of absolute equality among competing political candidates would have to give way, to some extent, to two other "worthy and desirable" objectives:

> First, the right of the public to be informed through broadcasts of the political events; and Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events.

Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 2 (1959) (comment of Chairman Harris).

Pursuant to these objectives, Congress amended Section 315(a) on September 4, 1959, to add the following exemptions:

> Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
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> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

[5] Congress' concern was that rigid application of Section 315 to broadcast coverage of political news would act as a deterrent to any coverage of political news at all. This concern was voiced in the Report of the Senate Committee on Interstate and Foreign Commerce, recommending the passage of the bill which was finally enacted, as follows:

> The inevitable consequence [of the FCC's rigid interpretation] is that a broadcaster will be reluctant to show one political candidate in any news-type program lest he assumes the burden of presenting a parade of aspirants.

S. REP. No. 562, 86th Cong., 1st Sess. 9 (1959).

> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

P.L. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315.

Thus armed with a not-so-clear Congressional directive generally exempting news broadcasting from Section 315's equal time requirements, the Commission set forth to apply the news coverage exemptions to specific kinds of events and coverage. In *The Goodwill Stations, Inc. (WJR)*, 40 FCC 362, 24 P & F RADIO REG. 413 (1962), the Commission ruled that a radio broadcast of a debate sponsored by the Detroit Economic Club between the two major Michigan gubernatorial candidates, part of a regular series of broadcasts of Economic Club luncheons, failed to qualify for exemption under Section 315(a)(4) as "on-the-spot coverage of bona fide news events . . . ." Ten days later, the Commission held in *National Broadcasting Co. (Wyckoff)*, 40 FCC 370, 24 P & F RADIO REG. 401 (1962), that a debate at the annual UPI convention featuring the two major California gubernatorial candidates could not qualify under the bona fide news event exemption. These two decisions, read together, effectively excluded all debates from the Section 315(a)(4) exemption. Two years later, the Commission ruled in response to a network's request that the broadcast of a press conference held by an incumbent President who is a candidate for reelection, or by a non-incumbent candidate for

President, is a non-exempt "use" of the broadcast facility within the meaning of Section 315. *Columbia Broadcasting System, Inc.*, 40 FCC 395, 3 P & F RADIO REG. 2d 623 (1964). The Commission's 1975 *Opinion* overrules these decisions concluding, *inter alia*, that they were based on an erroneous reading of the legislative history of Section 315(a)(4).

B. *Description of Parties and Immediate Background*

The Commission's 1975 *Opinion* was in response to petitions filed by the Aspen Institute Program on Communications and Society ("Aspen") and CBS, Inc. ("CBS"). The Aspen petition, filed on April 22, 1975, asked the Commission to reexamine its 1962 *Goodwill* and *Wyckoff* decisions, holding that debates between candidates could not qualify as "on-the-spot coverage of bona fide news events" under the Section 315(a)(4) exemption. *Aspen Institute Program on Communications and Society Petition for Revision of First Report, Fairness Report in Docket No. 19260 or for Issuance of Policy Statement or Declaratory Ruling*, April 22 1975. J.A. 1. Aspen argued that these 1962 rulings were based on the mistaken assumption that Congress intended Section 315(a)(4) to apply only to newscasts in which the candidates' appearance was "incidental to" an independent newsworthy event, and urged the Commission to adopt an interpretation of the exemption consistent with the Congressional purpose to encourage and increase news coverage of political events. Such a broad, remedial construction, Aspen urged, would enable broadcasters to "more effectively and fully . . . inform the American people of important political races and issues" and to "make the Bicentennial a model political broadcast year." *Opinion* at 1; J.A. 1-3.

The CBS petition, filed on July 16, 1975, requested a ruling that Presidential press conferences could likewise qualify under the Section 315(a)(4) exemption from the

equal opportunities requirements, so that broadcasters who covered such press conferences in the exercise of their professional news judgment would not incur equal opportunities obligations. *Columbia Broadcasting System, Inc., Petition for Declaratory Ruling*, July 16, 1975; J.A. 22. CBS pointed out that President Ford had formally announced his candidacy for the Republican nomination for President on July 8, 1975, more than 15 months before the election.[6] All broadcast appearances by the President thus potentially could give rise to equal opportunity demands by other candidates for the Republican nomination unless such appearances fell within the exemptions to Section 315. Broadcast coverage of Presidential press conferences under these circumstances would not be feasible throughout the entire period between the President's announcement and the 1976 election.[7] CBS requested that the Commission reexamine its 1964 ruling and interpret Section 315 as exempting live broadcast coverage of Presidential press conferences from the equal opportunities requirements where broadcasters in the exercise of their good faith news judgments decide that a conference is newsworthy. CBS Brief at 4-5. CBS argued that this interpretation was consistent with "the broad intent of Congress in enacting the 1959 amend-

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[6] J.A. 22. The Federal Election Campaign Act Amendments of 1974, 26 U.S.C. §§ 9032(6), 9037, encourage early declarations by candidates for the Presidency by making matching public funds available.

[7] In this regard, it is interesting to note the large number of candidates for the Presidency in recent elections, both serious and "fringe." The Federal Election Commission has published a listing of some 52 Presidential and Vice-presidential candidates on whose behalf reports have been filed during 1975. *See* 40 Fed. Reg. 49682, 49684-89 (Oct. 23, 1975). In 1960, there were at least 8 candidates, in 1968, there were 14, and in 1972, there were 11. CBS Brief at 42, *citing America Votes 10, A Handbook of Contemporary American Election Statistics* (R. Scammon, ed. 1973).

ments to Section 315 to ensure the free flow of vital news to the public and provide 'latitude for the exercise of good faith news judgment on the part of broadcasters and networks.'" CBS Brief at 5, *quoting* 105 CONG. REC. 17782 (1959) (remarks of Rep. Harris). *See also* CBS petition at 12; J.A. 33. To adhere to the earlier rulings, CBS contended, would inhibit the free flow of news from the President to the people.

On September 2, 1975, the Democratic National Committee filed comments on the CBS petition, opposing reconsideration of the Commission's 1964 ruling that Presidential press conferences were not exempt from the equal opportunities requirements of Section 315. J.A. 45. Shortly thereafter, on September 12, 1975, the Honorable Shirley Chisholm and the National Organization for Women filed comments opposing both the CBS and Aspen petitions. J.A. 70, 127.

The Commission's *Opinion*, released on September 30, 1975, acting on the CBS and Aspen petitions, overruled its 1964 *CBS* decision that Presidential press conferences could not qualify for exemption under Section 315(a)(4) and further held that press conferences of other candidates for political office broadcast "live and in their entirety" could also quality for the "on-the-spot coverage of bona fide news events" exemption.[8] The Commission also overruled its *Goodwill* and *Wyckoff* decisions, *supra*, and held that Section 315(a)(4) exempts from the equal opportunity requirement candidate debates sponsored by non-broadcast entities, *i.e.*, non-studio debates.

The basis for the Commission's reversal was its decision that the earlier cases had been based on a faulty reading of the legislative history surrounding the 1959

[8] The Commission reaffirmed its 1964 holding that press conferences cannot be considered exempt as "bona fide news interviews" under Section 315(a)(2). *Opinion*, para. 31-35; J.A. 157-59

amendment. With respect to the debates concerned in the *Goodwill* and *Wyckoff* decisions, the Commission in 1962 had rejected the contention that, for the purposes of Section 315(a)(4), it was sufficient that a licensee had exercised its good faith news judgment in concluding that a particular debate constituted a bona fide news event which it wished to cover live and determined instead that debates could qualify neither as "bona fide news interviews" (because the candidates, not the broadcaster, controlled the format and participants), nor as "bona fide news events" (because the appearance of the candidates was not "incidental to" some other news event—it *was* the event). In support of this "incidental to" test, the Commission had relied in 1962 on a 1959 House Committee Report[9] stating that "the principal test was 'whether the appearance . . . is incidental to the on-the-spot coverage of a news event or whether it is for the purpose of advancing the candidacy of a candidate.'" 40 FCC 364, 372-73, *quoted in* FCC Brief at 5. A second rationale advanced by the Commission was its fear that interpreting a debate to constitute a "bona fide news event" would effectively nullify the equal time objectives of Section 315 and deprive the other three exemptions of their meaning.[10]

[9] H.R. REP. No. 806, 86th Cong., 1st Sess. (1959).

[10] . . . if the sole test of the on-the-spot coverage exemption is simply whether or not the station's decision to cover the event and to put it on a broadcast program constitutes a bona fide news judgment, there would be no meaning to the other three exemptions in § 315(a) since these, too, all involve a bona fide news judgment by the broadcaster. Carried out to its logical conclusion, this approach would also largely nullify the objectives of § 315 to give the public the advantage of a full, complete, and exhaustive discussion, on a fair opportunity basis, to all legally qualified candidates and for the benefit of the public at large.

40 FCC at 398 (footnotes omitted).

The Commission's rationale for the 1964 *CBS* decision was essentially the same with respect to the Section 315 (a)(4) exemption as its rationale for the earlier debate decisions: the appearance of the candidate was not incidental to some other independently newsworthy event. In addition, the Commission rejected the argument that the broadcaster's good faith judgment of the newsworthiness of an event was sufficient to qualify coverage of the event for the Section 315(a)(4) exemption. 55 FCC 2d at 701, para. 13; J.A. 146.

In its 1975 *Opinion*, the Commission concluded that the analysis upon which it had based its decisions in these three cases had been erroneous. The Commission now concluded that the "incidental to" test had been removed from the proposed legislation prior to its enactment in 1959. *Id.* at 703, para. 22; J.A. 150.[11] The "incidental to" requirement was, in fact, stricken in conference in the face of opposition during the floor debate in the House,[12] and the conference bill was adopted without the disputed language.[13] Under the new test, the Commission no longer

[11] 47 U.S.C. § 315(a)(3), not relevant here, explicitly retains the "incidental to" requirement.

[12] See the statement of Rep. Bennett of Michigan, 105 CONG. REC. 16241. At the floor discussion of the bill following deletion of the "incidental to" provision, Bennett stated: "I am glad to see that the conference substitute omits this language because the majority of conferees felt as I do, that this requirement would lead to even greater confusion than we have at present under the Lar Daly decision." *Id.* at 17778.

[13] Rep. Moss, who had drafted the "incidental to" language, dissented from the conference report and during floor debate circulated a letter detailing his reasons. Rep. Bennett responded as follows:

> I feel that this language ["incidental to the presentation of news"] would make the task of broadcasters and the FCC an impossible one and that even with the best intentions in the world neither broadcasters nor the Commission can meet the task of distinguishing between appearances which are incidental and appearances which are not incidental.

105 CONG. REC. 17778.

seeks to determine whether the appearance of the candidate in a debate is the central aspect of the presentation or is merely incidental to some other independently newsworthy event, and

> . . . a program which might otherwise be exempt does not lose its exempt status because the appearance of a candidate is a central aspect of the presentation, and not incidental to another news event.

Id. at 704-05, para. 23; J.A. 153.[14] The new test, in the Commission's words, "[A]llows reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to eligibility for section 315 exemption to their reasonable and good faith judgment." *Id.* at 708, para. 30; J.A. 157. The Commission further found that reversal of its prior decisions "comports with the original legislative intent and serves the public interest by allowing broadcasters to make a fuller and more effective contribution to an informed electorate." *Id.* at 706, para. 27; J.A. 154.

On September 26, 1975, Representative Chisholm and NOW filed their petition for review in this court. Shortly

[14] The Commission determined that the same rationale applied with respect to press conferences, stating that, "[P]ress conferences do not lose their exemption merely because the candidate's appearance is the central aspect of the news event." 55 FCC 2d at 708, para. 30; J.A. 157. In this regard, the Commission declined to adopt CBS's rationale which would have distinguished between Presidential and other press conferences based on the "unique status of the Presidency and the inherent newsworthiness of Presidential communications with the public." *Id.* at 711, para. 39; J.A. 161.

thereafter, all three major networks intervened. DNC filed its petition for review on October 8, 1975, and the two cases were consolidated.[15] Jurisdiction is properly invoked under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

II. Legislative History of the News Coverage Exemptions

Our starting point in determining the scope and meaning of Section 315(a)(4) is, of course, the intent of Congress. For this we look both to the statutory language itself and to the legislative history. In the words of Justice Frankfurter,

> [a] statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is that true where the statute . . . is part of a legislative process having a history and a purpose.

United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

We note initially that the four exemptions apply generally to news broadcasts and that subsection (4), with which we are directly concerned, is limited to "on-the-spot [live] coverage of *bona fide news events* (including but *not limited to* political conventions and activities incidental thereto) . . . ." 47 U.S.C. § 315(a)(4) (1959) (emphasis added). All of the exemptions, in fact, contain the requirement that the program or event be "bona fide" news, yet the language itself provides no ready clue as to how this requirement is to be satisfied. It is unclear from the statute whether the test refers to the character of the event (*i.e.*, its inherent newsworthiness), the nature of the candidate's appearance (*i.e.*, whether

[15] By order dated October 17, 1975, No. 75-1994 (DNC) was consolidated with No. 75-1951 (Rep. Chisholm and NOW).

the format is that of a debate, press conference, speech, etc.), or the candidate's relation to the broadcast (*i.e.*, whether he "controls" it). Moreover, the exemption provisions do not reveal who is to make this crucial determination, the broadcaster or the Commission. The only clue from the language of Section 315(a)(4) is the parenthetical phrase which states that political conventions and activities incidental thereto—presumably nominating and acceptance speeches—definitely constitute "bona fide news events," and that the scope of the exemption extends to some others news events by some standard not apparent from the statutory language.

A. *Legislative History Prior to the Passage of the News Exemptions*

Central to the Commission's reversal of its *Goodwill*, *Wyckoff* and *Columbia Broadcasting System* decisions was its determination that those decisions were based upon an erroneous reading of the legislative history surrounding passage of the 1959 amendment to Section 315. Our examination reveals that the legislative history preceding passage of the amendment is inconclusive on the issue of whether Congress intended specifically to include or exclude non-studio debates and candidate's press conferences. It is clear, however, that Congress intended to give the Commission some leeway in interpreting the four exemptions and in applying them to particular program formats in order to further the basic purpose of the amendment, "[To] enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree."[16] That the Commis-

[16] 105 Cong. Rec. 14451 (1959) (remarks of Sen. Holland). *See also* 106 Cong. Rec. 13424 (1960) (Sen. Pastore).

sion has considerable discretion in this area is clear from the Senate Report, which states in part:

> [T]he committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. In this way the Commission will be able to determine *on the facts submitted in each case* whether a newscast, news interview, news documentary, on-the-spot coverage of news event, or panel discussion is bona fide or a "use" of the facilities requiring equal opportunity.
>
> The Congress created the Federal Communications Commission as an expert agency to administer the Communications Act of 1934. As experts in the field of radio and television, the Commission has gained a workable knowledge of the type of programs offered by the broadcasters in the field of news, and related fields. Based on this knowledge and other information that it is in a position to develop, the Commission can set down some definite guidelines through rules and regulations and *wherever possible by interpretations.*

S. REP. NO. 562, 86th Cong., 1st Sess. 12 (1959) (emphasis added).

That Congress intended the Commission to play an important role in developing the Section 315 exemptions is also evident from Congress' decision not to legislate in detail, but rather to set out broad categories for exemption of news-related coverage and leave the Commission with the task of implementing Congressional intent.[17] *See* 105 CONG. REC. 16227 (1959) (remarks of Rep. Celler); 105 CONG. REC. 14455 (1959) (remarks of Sen. Pastore). Moreover, the equal time provision itself contains a provision, Section 315(d), granting the Commission authority to prescribe appropriate rules and regulations to carry out the provisions of Section 315. This is something more than the normal grant of authority permitting an agency to make ordinary rules and regulations, since the Commission already has such authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." 47 U.S.C. § 303(r) (1937). *See Kay v. FCC*, 443 F.2d 638, 643 (D.C. Cir. 1970).

[17] In drafting the exemptions, the Senate and House Committees drew from a number of proposed bills, including S. 1585, S. 1604, S. 1858, S. 1929, H.R. 7122, H.R. 7180, H.R. 7216, H.R. 7602, H.R. 7985, 86th Cong., 1st Sess. (1959). The final version did not include earlier proposals to enumerate specific exempt events, such as debates or panel discussions. *See, e.g.*, the Hartke bill (S. 1858). The elimination of such specific formats, however, was not intended to exclude them if they could qualify under one of the general categories of news coverage in the final bill. Oren Harris, Chairman of the House Committee and the bill's floor manager, stated:

> [T]he elimination of these categories by the committee was not intended to exclude any of these programs if they can be properly considered to be newscasts or on-the-spot coverage of news events.

105 CONG. REC. 16229 (August 18, 1959). *See also id.* at 17782 (Sept. 2, 1959) (remarks of Rep. Harris).

In short, in the final version of the bill, Congress opted for exemptions based on general categories relating to news coverage, rather than on specific program formats, and this of necessity left the Commission with the task of deciding which particular events could qualify within the limits of the statutory language. *Id.* at 17778 (Sept. 2, 1959) (remarks of Rep. Harris). This is also clear from the language of § 315(a)(4), "(including *but not limited to* political conventions and activities incidental thereto) . . ." (emphasis added).

Although we believe it unnecessary here to retrace in detail the legislative history preceding passage of the

1959 amendment, we note that it provides substantial support, although inconclusive, for the Commission's interpretation. Under these circumstances, we believe it our duty to defer to the Commission's interpretation of the statute which it is charged with administering. This court has often reiterated the principle that

> [i]n approaching the problem of statutory interpretation . . . we show "great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'"

Philadelphia Television Broadcasting Co. v. FCC, 123 U.S.App.D.C. 298, 359 F.2d 282, 83-84 (1966) (citation omitted). Such deference is especially appropriate where, as here, Congress has opted for legislative generality, leaving the agency with the task of evolving definitions on a case-by-case basis. *See, e.g., Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 96 (1959) (Statement of Comm'r Doerfer).

We also find petitioners' argument that the four exemptions were intended to be narrowly construed unsupported by the legislative history. Rather, we find more convincing the Commission's, and Aspen's, contention that the purpose of the 1959 amendment was broadly remedial, and evidenced a willingness by Congress to take some risks with the equal time philosophy in order to permit broadcast coverage of on-the-spot news and to enable broadcasters more fully to cover the political

news.[18] Admittedly, Congress intended that the 1959 amendments would preserve the basic philosophy behind the equal time requirement.[19] At the same time, however, Congress was determined to increase broadcaster discretion and allow increased live broadcast coverage of political news. This was the tone set for the opening of the hearings on the proposed 1959 amendments by Representative Harris, the Chairman of the House Subcommittee on Communications and Power, when he stated:

> This section [§ 315] by providing absolute equality among competing political candidates comes into conflict with two other worthy and desirable objectives:
>
> First, the right of the public to be informed through broadcasts of political events; and
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> Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events.

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[18] The Senate Report stated that, "The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters." S. REP. No. 562, 86th Cong., 1st Sess. 10 (1959).

[19] A careful examination of the legislative history of Section 315 of the Communications Act and its predecessor, Section 18 of the Radio Act of 1927, reveals clearly that the fundamental objective of that statute was to require any licensee who had allowed any legally qualified candidate to use his facilities to afford equal opportunities to all other candidates for that same office. Its basic purpose was to require equal treatment by broadcasters of all candidates for a particular public office once the broadcaster made a facility available to any one of the candidates. *This was a sound principle and the committee re-emphasizes its belief in that objective.*

S. REP. No. 562, 86th Cong., 1st Sess. 8 (1959) (emphasis added), *quoted in* Brief for Petitioners Chisholm and NOW at 27 n.4.

> Thus the principle of absolute equality for competing political candidates requires modification in the light of these two additional considerations and that is the specific problem which the Congress must face -just how far the equality principle should give way to these other two principles. This question is to be developed in the course of these hearings.

Hearings on H.R. 5389, H.R. 5678, H.R. 6326, H.R. 7123, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. at 1-2 (1959) (Statement of Hon. Oren Harris, Chairman).

Nothing in the language of subsection 315(a)(4) itself would indicate that debates or press conferences could not be considered "news events" worthy of coverage. On the contrary, the inherent newsworthiness of speeches and debates seems no greater or less than that of "political conventions and activities related thereto," events expressly within the scope of the exemption. It is indisputable that print media consider such events newsworthy.[20] We remain unconvinced by petitioners'

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[20] It seems beyond dispute, from a commonsensical point of view, that the Presidential press conference is an important news event. Such conferences are regularly printed in the newspapers—indeed, the *New York Times* regularly prints a transcript of each Presidential press conference. *See generally* MORGAN, WAYS, MOLLENHOFF, LISAGOR and KLEIN, THE PRESIDENCY AND THE PRESS CONFERENCE (1971); Strout, *LBJ Meets the Press . . . Sort of*, 154 NEW REPUBLIC 13 (1966). The networks regularly have covered Presidential press conferences in their entirety since they first became available in the mid 1950's. In this regard, NBC notes in its brief that since 1955 it has carried more than 100 Presidential news conferences, almost all those available. NBC Brief at 35.

Debates between major candidates are also "news" in this respect. We do not understand petitioners to contend, for example, that the Nixon-Brown debate at issue in the *Wyckoff* [illegible] not newsworthy. They contend rather that the

arguments that these events are distinguishable based on the degree of control by the candidate, or the degree to which candidates tailor such events to serve their own political advantages. It is more reasonable to believe, as the Commission apparently does, that *any* appearance by a candidate on the broadcast media is designed, to the best of the candidate's ability, to serve his own political ends.[21] There is ample support in the legislative history for the Commission's conclusion that a candidate's partial control over a press conference or debate does not, by itself, exclude coverage of the event from Section 315(a)(4). This conclusion is consistent with the Commission's new position that, absent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals.[22]

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event derived its newsworthiness from the appearances of the candidates themselves and not from some independently newsworthy event and, hence, would have given rise to equal time obligations.

[21] The Commission's Brief states at 25-26:

> In keeping with the focus on the type of news coverage of events rather than the events themselves, Congress chose to determine the bona fides of coverage by looking at the intent of the broadcaster rather than at the intent of the candidate . . . since a candidate always intends to advance his candidacy.

[22] Indeed, the *Lar Daly* case, the event which was responsible for the passage of the news exemptions, is in point. There Congress expressly overruled the Commission's holding that news coverage of a mayor's airport greeting of a foreign dignitary and his opening of a charity drive constituted a use of the broadcast media entitling all other mayoral candidates to equal time. At least with respect to the charity drive, the event can be deemed newsworthy only because of the mayor's appearance, and the appearance was certainly under his control. Similarly,

> [i]n the case of political conventions the respective political parties largely control whether, in what ca-

See, e.g., National Broadcasting Company, 25 FCC 2d 735, 20 P & F RADIO REG. 2d 301, 303 (1970); *In re Complaint Covering CBS Program, "Hunger in America,"* 20 FCC 2d 143, 17 P & F RADIO REG. 2d 674, 683 (1969); *Thomas R. Fadell*, 40 FCC 380, 381-382, 25 P & F RADIO REG. 288, *aff'd per curiam sub nom., Fadell v. Federal Communications Commission*, 25 P & F RADIO REG. 2063 (7th Cir. 1963).

Concurrently with the omission of the "incidental to" requirement from subsection (a)(4),[23] Congress increased the scope of broadcaster discretion to determine whether a news event was "bona fide" and deserving of coverage. In the words of Chairman Harris,

> Under the substitute agreed to in conference, the appearance of a candidate on a newscast or news interview will not be exempt from the equal time requirement unless the newscast or news interview is bona fide, and appearance of a candidate in on-the-spot coverage of news events is not to be exempt from the equal time requirements unless the program covers bona fide news events. This requirement regarding the bona fide nature of the newscast, news interview or news events was not included without careful thought by the conference committee. It sets up *a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks. . . .*

105 CONG. REC. at 17782 (1959) (emphasis added).

It is thus inescapable that the final bill provided more room for broadcaster discretion than the earlier version, which had retained the "incidental to" language. Whether broadcaster discretion was intended to be the sole criterion of the bona fide nature of a news event, absent a violation of the fairness obligation, is less certain, however, and we are unable to reach a definite conclusion from the legislative history. We note only that the thrust of the 1959 amendment was toward increasing broadcaster discretion to cover political news. We find the Commission's *Opinion* entirely consistent with this theme.

Based thus on the broad intent of Congress to maximize broadcast coverage of political events and to increase broadcaster discretion, as well as Congress' expressed willingness to take some risks with the equal time philosophy in order to achieve these goals and to grant the Commission some leeway in interpreting the exemptions, we conclude that the Commission's recent *Opinion* appears consistent with the general Congressional purpose expressed in the legislative history preceding the 1959 amendment.

B. *Congressional Action and Inaction Subsequent to Passage of the 1959 Amendment*

Petitioners argue that Congressional action after 1959 was consistent with their interpretation that Section 315(a)(4) was never intended to apply to debates or press conferences and, alternatively, that Congress ratified the Commission's original interpretation of the bona

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pacity, and to what extent a particular political candidate shall participate in the convention; and the broadcaster exercises his news judgment primarily with respect to whether or not he will provide on-the-spot coverage of a particular political convention, and, if so, what parts . . . .

H. R. REP. No. 802, 86th Cong., 1st Sess. 7 (1959).

[23] We note that the 1959 amendment to Section 315 retained the "incidental to" test in the definition of a "bona fide news documentary" as a compromise between the Senate bill, which had excluded documentaries, and the House bill, which had not. *See* H.R. CONF. REP. No. 1069, 86th Cong., 1st Sess. 4, printed at 105 CONG. REC. 17777 (1959).

fide news event exemption and subsequently "reenacted" Section 315 without modifying the news exemptions.

We turn first to petitioners' contention that the 1960 suspension of the equal time requirement in order to permit the so-called "Great Debates" between Democrat John F. Kennedy and Republican Richard M. Nixon evidenced a legislative recognition that debates were not exempt under the 1959 amendment. Brief for petitioners Chisholm and NOW at 40. We find no such indication. Senate Joint Resolution 207 suspended Section 315 in its entirety as it applied to all Presidential and Vice-presidential candidates; it never addressed the coverage of the 1959 amendments and placed no limits whatsoever on the kinds of events covered by broadcasters.[24] Such political programming took a variety of

[24] Senate Joint Resolution 207 provided:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That that part of section 315(a) of the Communications Act of 1934, as amended, which requires any licensee of a broadcast station who permits any person who is a legally qualified candidate for any public office to use a broadcasting station to afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, is suspended for the period of the 1960 presidential and vice presidential campaign with respect to nominees for the offices of President and Vice President of the United States. Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest.
>
> (2) The Federal Communications Commission shall make a report to the Congress, not later than March 1, 1961, with respect to the effect of the provisions of this joint resolution and any recommendations the Commission may have for amendments to the Communications Act of 1934 as a result of experience under the provisions of this joint resolution.

P.L. 86-677.

different forms, including some clearly not otherwise exempt from the equal time requirements. *See Hearings Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 66 (1961). In fact, the Senate Report accompanying the Joint Resolution stated that one reason for the suspension was that the Commission had not yet had sufficient time to interpret the new exemptions; consequently, the across-the-board suspension was designed, at least in part, to provide time for necessary evaluation of the effects of the amendments. S. REP. No. 1539, 86th Cong., 2d Sess. 2 (1960) (statement of Sen. Pastore). Given the scope of the Section 315(a) exemptions, especially their applicability to broadcast coverage of all 1960 election contests except the Presidential race and to all future contests as well, we must conclude that the 1960 suspension of Section 315 is more properly viewed as an isolated experiment in total repeal of the equal time requirements for Presidential and Vice-presidential candidates, and not as a recognition or limitation of the scope of the news coverage exemptions.[25]

Petitioners next argue that Congressional acquiescence in and affirmance of the Commission's prior interpretation of the "bona fide news event" exemption over a period of more than ten years demonstrates that the Commission's former interpretation was the correct one and, consequently, that the *Wyckoff*, *Goodwill*, and *Columbia Broadcast System* decisions have taken on the force of law. Specifically, petitioners urge that Congress was aware of the Commission's interpretation and did not indicate disapproval. DNC Brief at 44-47. Petitioners then argue that this inaction ratified the Commission's 1962 decisions by acquiescence and, further, that the

[25] This interpretation is also consistent with the reporting provision in subsection (2) of the Joint Resolution, *supra*.

Federal Election Campaign Act of 1971 "reenacted" Section 315, thereby incorporating the Commission's interpretation into the Act such that it could be altered only by Congress. Brief for petitioners Chisholm and NOW at 65-66; DNC Brief at 44-51.

We begin by noting that attributing legal significance to Congressional inaction is a dangerous business. *See, e.g., Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408-10 (1961). The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969), and "affords the most dubiousness foundation for drawing positive inferences," *United States v. Price*, 361 U.S. 304, 310-11 (1960) (Harlan, J.).[26] *See also Jones v. Liberty Glass Co.*, 332 U.S. 524, 533 (1947) ("The doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions"). On the other hand, the Court has recently stated that

> [a] court may accord great weight to the longstanding interpretation placed on a statute by an agency

[26] In *Zuber v. Allen*, the Court went on to state:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946). Its significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme. Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment . . . . *Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone . . . approval . . . .*

396 U.S. at 186 n.21 (emphasis added).

> charged with its administration. This is especially so where Congress has reenacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (citations omitted).

Petitioners argue that Congress acquiesced in the FCC's prior interpretation both actively and passively; "passively by not enacting legislation to correct it, and actively by, in effect, reenacting § 315 in 1972 by amendments in important particulars, without in any way changing the language of the statute here pertinent." DNC Brief at 19. The Commission's interpretation of the 1959 amendments, petitioners assert, "was well known and clearly understood by Congress in the ensuing decade." DNC Brief at 44.

Our examination of Congressional action subsequent to the enactment of the equal time exemptions reveals nothing that can be interpreted as active approval of the Commission's 1962 interpretation. Subsequent hearings concentrated more generally on proposals to abolish the equal time requirement altogether or to amend the law to permit studio debates or speeches, both non-exempt uses under either of the Commission's interpretations. Petitioners rely upon the fact that the Commission's decisions were reported to Congress and discussed, for example, in the Commission's *Annual Reports* to Congress and *Equal Time Primer*. DNC Brief at 44-46. Although this indicates that Congress was "aware" of the Commission's interpretation, at least in a technical sense, Congressional inaction in this instance is entirely consistent with the interpretation that Congress was willing to leave to the Commission the interpretation of the exemptions as they applied to specific program formats.

In this sense, Congressional acquiescence in the Commission's interpretation does not indicate that it was the only, or the best, interpretation. The circumstances surrounding the reports themselves indicate that Congress had in no way adopted the Commission's interpretation as its own. For example, in the 1963 Hearings before the House Commerce Committee, FCC Chairman Minow cited the Brown-Nixon debate as an example of a close case in applying the Section 315(a)(4) exemptions and informed the Committee that the Commission had ruled that the debate did not qualify as a bona fide news event. In response, Chairman Harris strongly indicated his disagreement with the Commission's narrow interpretation of the "bona fide news event" exemption, stating:

> Is not the bringing together of two major political candidates . . . a bona fide news event? Perhaps, I do not appreciate the definition of a bona fide news event. . . . Are we going to deprive the people under this strict interpretation which you suggest here, of the broadcastings of this event?

Political Broadcasts—Equal Time Hearing Before the House Commerce Committee, 88th Cong., 1st Sess., 65-67 (1963), *quoted in* FCC Brief at 37. Certainly this statement is less consistent with ratification of the Commission's interpretation than with a willingness to allow the Commission some leeway in interpretation and application of the exemption to specific news-related formats. In short, under these circumstances, we believe that Congress' failure to overrule the *Wyckoff*, *Goodwill* and 1964 *Columbia Broadcasting System* decisions sheds little light on Congress' intent, other than to demonstrate adherence to the basic philosophy of the equal time requirement, since such inaction must be viewed against the background of Congress' decision to leave the Commission some discretion to decide which particular events should qualify for the broadly defined news coverage exemptions.[27]

Petitioners further contend that the Federal Election Campaign Act ("FECA"), 86 Stat. 3 *et seq.*, reenacted Section 315, thereby positively approving the prior administrative construction. DNC Brief at 44-52; Brief for Chisholm and NOW at 65-67. We find this argument wholly unpersuasive. Although Congress did amend the Act in 1971 to include provisions relating to the cost of political advertising, 86 Stat. 4, 47 U.S.C. § 312(a)(7), the nature of the "reenactment" was extremely limited and concerned solely with reforming political campaign finance activities. The FECA amendments were in no way concerned with the equal time exemptions, and, in fact, by-passed Section 315(a) altogether. The doctrine of reenactment simply cannot be stretched this far. *See generally* SUTHERLAND ON STATUTORY CONSTRUCTION, §§ 22.08, 22.33 (1973).

The cases upon which petitioners rely for this contention are likewise distinguishable: all involved more specific reenactments or viewed Congressional acquiescence as but one of many factors in interpreting ambiguous statutory language. For example, in *Helvering v. Reynolds Tobacco Co.*, 306 U.S. 110 (1939), a case cited by petitioner DNC as "precisely dispositive," the Supreme Court held that the reenactment of the Revenue Acts without alteration indicated Congressional approval of the administrative construction of the Treasury Department; hence, the construction had attained the force of law. 306 U.S. at 114-15, *cited in* DNC Brief at 48. In that case, however, the specific statutory provision had been fully restated and repeatedly reenacted without change in each successive Revenue Act. *Id.* at 115 n.10. Moreover, the Supreme Court has recognized

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[27] See discussion in Part IIA of this opinion.

the unique character of Internal Revenue Code cases due to the practice of Congressional amendment and reenactment. *See Zuber v. Allen*, *supra*, 396 U.S. at 185 n.21. Similarly, in *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956), the Supreme Court refused to allow a new administrative definition of "debenture" to include certain promissory notes in the face of a consistent definition of 23-years duration. There, however, the Court based its decision largely on express Congressional approval of the old definition, since Congress had incorporated a similar definition into the statute by amendment, *id.* at 390-91, and since debentures and promissory notes had been taxed under separate provisions until the tax on promissory notes was repealed. *Id.* at 388-91. Finally, in *Kay v. FCC*, 143 U.S.App.D.C. 223, 443 F.2d 638 (1970), a panel of this court upheld the Commission's interpretation of Section 315 to apply separately to primary and general elections, so that during a primary election a broadcast "use" by a candidate gives rise to equal opportunities obligations only with respect to other candidates for his party's nomination. In *Kay*, however, the fact that Congress had amended Section 315 in 1959 without changing the language relied upon by the Commission was considered merely "an added circumstance which has some persuasive weight." *Id.* at 646. The *Kay* court specifically stated that legislative silence in the face of administrative interpretation does not necessarily indicate legislative approval. *Id.*[28]

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[28] In Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), *cited in* Kay v. FCC, *supra*, the Supreme Court stated:

> [I]n the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of [an earlier decision], the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision.

398 U.S. at 241-42.

We are thus unable to discover from the extensive, if rather ambiguous, legislative history any conclusive indication of a Congressional intent with respect to candidates' debates and press conferences. Congress' failure to take action in the face of the Commission's 1962 and 1964 decisions is subject to more than one interpretation. In the words of Judge Hand:

> . . . [N]ot every ruling is incorporated in the text because it is not repudiated [by Congress]; no one has ever suggested anything of the sort. At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed. . . . To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to be unwarranted. . . .

F. W. Woolworth Co. v. United States, 91 F.2d 973, 976 (1937), *quoted in* FCC Brief at 42.

Moreover, petitioners' acquiescence and reenactment arguments must be viewed in the context of the ability of administrative agencies to overrule past decisions,[29] particularly in light of the discretion traditionally afforded the Commission in interpreting and applying the equal time provision. Congress' failure to change the statute in the face of the Commission's interpretation is thus entirely consistent with a demonstrated willingness to allow the Commission some leeway in interpreting the news exemptions and in applying them to specific news-related events.

In these circumstances, we are in no position to say that the Commission has misinterpreted Congress' intent or usurped its authority. The Commission's *Opinion* is consistent with the broad Congressional purpose

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[29] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.07 (1965).

in enacting the 1959 exemptions—permitting increased broadcaster discretion and encouraging greater coverage of political news—and operates in an area where the Commission has been granted greater than normal discretion. We are therefore required to defer to the Commission's interpretation.

III. The Procedural Issue: The Propriety of Overruling a Longstanding Administrative Decision via Declaratory Order Rather Than Through Rulemaking

Finally, petitioners Chisholm and NOW argue that, even if the Commission had authority to change its interpretation of Section 315(a)(4) to include non-studio debates and candidates' press conferences, it was required to follow rulemaking procedures, including issuing formal public notice of the CBS and Aspen proposals and inviting public comment in conformance with the Administrative Procedure Act, 5 U.S.C. [illegible]3, 706 ("APA") and the Due Process Clause of the Constitution. This is so, petitioners argue, because the Commission's *Opinion* enunciates new standards for determining what constitutes "on-the-spot coverage of bona fide news events" which are of general prospective application. Brief for Petitioners Chisholm and NOW at 3-4.

We note initially that an administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding. *See, e.g., Automobile Club v. Commissioner of Internal Revenue*, 353 U.S. 181 (1957). *See also American Trucking v. AT&S F.R. Co.*, 387 U.S. 397, 416 (1967); *NLRB v. A.P.W. Product Co.*, 316 F.2d 899 (2d Cir. 1963).

It is, of course, incumbent upon an agency reversing its own policy to provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc. v. FCC*, 147 U.S. App.D.C. 175, 454 F.2d 1018, 1026 (1971). The *Opinion*, grounded in the Commission's interpretation of the legislative history of the 1959 amendment and in the broad Congressional intent to provide for increased news coverage of political news, satisfies this minimal standard and is in no other respect "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(a).

Respecting petitioners' claim that the Commission acted improperly in reversing precedent which has been followed for more than a decade via adjudication,[30] rather than through notice and comment rulemaking, we must differ with petitioners' reading of *NLRB v. Bell Aerospace, supra.* In *Bell Aerospace*, the Supreme Court held that the issue of whether certain buyers were managerial personnel, and thus exempt from the coverage of the National Labor Relations Act, need not be decided by rulemaking. That case, like this one, involved a ruling contrary to the agency's past decisions; yet, the Court held that the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application. *Id.* at 291-95. *See also* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*,

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[30] The declaratory ruling belongs to the genre of adjudicatory rulings. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform.*, 118 U. Pa. L. Rev. 485 (1970).

118 U. PA. L. REV. 485, 508-13 (1970). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 501 (1958 ed.). *Bell Aerospace* relied heavily on *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*), in which the Court had stated that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203, *quoted in NLRB v. Bell Aerospace*, *supra*, 416 U.S. at 293. Although the majority in *Bell Aerospace* indicated that there could be instances where reliance on adjudication rather than rulemaking would amount to an abuse of discretion, *id.* at 294, we find nothing to indicate that this is such a case. The original interpretation of the 1959 exemptions, which the 1975 *Opinion* reversed, was also established by adjudication; thus reversal by adjudication seems particularly appropriate here.[31] Adjudicatory decisions do not harden into "rules" which cannot be altered or reversed except by rulemaking simply because they are longstanding.

Moreover, we see no advantage to be gained in this instance by requiring the Commission to proceed via the formalities of rulemaking rather than through adjudication. Petitioners DNC, Chisholm and NOW all submitted lengthy comments to the Commission in opposition to the Aspen and CBS petitions. As in *Bell Aerospace*, *supra*, we believe the issues were fully aired before the Commission, which had the benefit of all arguments raised before this court.[32] It is therefore difficult to see how

[31] The views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board [the NLRB] is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.

416 U.S. at 294.

[32] Petitioner DNC filed a 25-page letter with the Commission in opposition to the CBS petition. J.A. 45. Petitioners Chisholm and NOW also commented on the CBS and Aspen petitions in a 46-page document submitted by the Media Access Project ("MAP"). MAP offered further comments on the proposals in a second 13-page document. These documents contain substantially the same arguments advanced in this appeal.

requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments. *Cf. Banzhaf v. FCC*, 132 U.S.App.D.C. 14, 36, 405 F.2d 1082, 1104 (1968), *cert. denied*, 396 U.S. 842 (1969).

For these reasons, we see no procedural irregularity of any substance in the Commission's 1975 *Opinion*.[33] The Commission carefully studied the petitioners' arguments, both explicit in their written submissions and implicit in the Commission's own interpretations, the *Wyckoff*, *Goodwill* and *Columbia Broadcasting System*

[33] Petitioners Chisholm and NOW further contend that the Commission has violated its own regulations which provide that it "may, in accordance with section 5(d) of the Administrative Procedure Act [5 U.S.C. § 554(e)], on motion or on its own motion issue a declaratory ruling terminating a controversy or removing an uncertainty." 47 C.F.R. § 1.2. Petitioners argue that the Commission was not presented with an actual controversy, since there was no request for equal time by any candidate against CBS or any other licensee. This is entirely too rigid an interpretation of the phrase "terminating a controversy or removing an uncertainty." The literal language and the fact that the rule contemplates action by the Commission *sua sponte* remove any doubt that the Commission's action in issuing the declaratory order was in accordance with its own procedural regulations.

decisions, and rejected them in a well reasoned statement. The Commission thus satisfied the demands of the Administrative Procedure Act and the Due Process Clause.[31]

IV. Conclusion

In conclusion, we find nothing in the Commission's *Opinion* inconsistent with the basic philosophy of Section 315 as amended in 1959. The 1959 amendment to Section 315 clearly limited to some extent the simple mechanistic application of that section. In creating a broad exemption to the equal time requirements in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion. Rather than enumerate specific exempt and non-exempt "uses," Congress opted in favor of legislative generality, preferring to assign that task to the Commission.

In attempting to implement the Congressional intent behind passage of the four news exemptions, the Commission has now reversed its prior interpretation and embarked on a new course which it believes to be more consistent with the letter and spirit of the 1959 amendment. According to our reading, the legislative history

[31] It is interesting, as Judge Wright notes, to compare the procedures followed by the FCC here with the more lengthy procedures approved in this court's *en banc* opinion in Ethyl Corp. v. EPA, —— U.S.App.D.C. ——, —— F.2d —— (No. 73-2205, decided March 19, 1976). *See* Dissenting Op. at 51 n.99. The two cases differ substantially, however, in that the FCC's task here was to interpret a statute, while the EPA's task in *Ethyl* was to reach a conclusion based on scientific evidence. In the former case, the only relevant "public procedures" were hearings and debates already held by Congress; in the latter, extensive facts were to be studied by EPA and commented on by the public before a proper conclusion could be reached.

is inconclusive, but we find much support for the Commission's new interpretation. In these circumstances, we are obligated to defer to the Commission's interpretation, even if it is not the only interpretation possible. We find nothing in Congress' behavior since 1959, either active or passive, to indicate that the Commission's prior interpretation was necessarily correct, or that Congress adopted it. Moreover, we find no infirmity in the procedure by which the Commission changed its interpretation of the 1959 amendment, since the Commission was not required to proceed by rulemaking, and since nothing would be gained by requiring the Commission to so proceed. We reiterate that petitioners submitted lengthy comments to the Commission and advanced substantially all of the arguments advanced here. Finally, we note only in passing that this case involves issues in an intensely political area which this court enters with great reluctance. It is the job of the Commission in the exercising of its delegated authority, and ultimately of Congress, to make these kinds of front-line determinations. We find no basis for disturbing the Commission's action here, grounded as it is on the Commission's interpretation of Congressional intent, an interpretation which we find reasonable.

For the reasons stated herein, we affirm the Commission's *Opinion*. In so doing, however, we take comfort in the realization that Congress may correct the Commission if it has misinterpreted Congressional intent or overstepped the bounds of its discretion.

So ordered.

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WRIGHT, *Circuit Judge, dissenting*: In the recent past the Federal Communications Commission has repeatedly urged Congress to amend or repeal the "equal time" provision contained in Section 315 of the Communications Act.[1] The Commission's recommendation is based on its conclusion that Section 315, including the 1959 amendment, prevents the American people from receiv-

[1] 47 U.S.C. § 315 (1970), *as amended* (Supp. IV 1974). Section 315 provides, in relevant part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
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> (2) bona fide news interview,
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
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> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
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> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.
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> * * * *
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> (d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

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ing adequate broadcast coverage of political campaigns.[2] Congress, however, has not acted.

There is no indication that Congress' failure to act on the Commission's recommendations with respect to Section 315 is an inadvertence. From the very beginning of broadcasting in this country Congress has been aware of the potential of the new media to shape and influence public opinion, particularly in the political forum. To say that time has confirmed that judgment is to understate the obvious. To protect political candidates, local and national, from the danger of partisan use of the media as well as to protect the constitutional principle of electoral equality,[3] Congress inserted the equal time provision in its first major piece of legislation relating to broadcasting[4] and it has remained in the law to this day.

I do not doubt that the Commission's current position on Section 315 represents its best judgment of where the public interest lies, nor do I find the policy arguments in favor of the Commission's approach unconvincing. But sincere beliefs cannot substitute for a grant of authority, and frustration with the deliberateness of the legislative process cannot excuse failure to comply

[2] *See, e.g.*, Hearings on S. 2 Before the Subcommittee on Communications of the Senate Committee on Commerce, 94th Cong., 1st Sess., 53, 61-64 (1975); FEDERAL COMMUNICATIONS COMMISSION, 39TH ANNUAL REPORT/FISCAL YEAR 1973 at 39. *See also* brief for petitioners the Honorable Shirley Chisholm and National Organization for Women (hereinafter Chisholm br.) at 61 & n.4.

[3] As this country moves toward public financing of political campaigns with overall limits on candidate expenditures, *see Buckley v. Valeo*, —— U.S. ——, ——-——, 44 U.S. L. WEEK 4127, 4152-4159 (Jan. 30, 1976), the importance of the equal time requirement increases dramatically.

[4] Radio Act of 1927, ch. 169, § 18, 44 STAT. 1170.

with the requisites of the administrative process. *Cf. Citizens Communications Center v. FCC*, 145 U.S.App. D.C. 32, 447 F.2d 1201 (1971), *clarified*, 149 U.S.App. D.C. 419, 463 F.2d 822 (1972). In this case I am convinced that the Commission, in rejecting its own prior opinions[5] as to the intent of Congress in passing the 1959 amendment to Section 315, has substituted its own judgment for decisions made by Congress, and has acted without regard for the procedures it was required to follow.

I. The Commission's Action Exceeds Its Congressionally Delegated Authority

As the majority emphasizes, the 1959 amendment to Section 315 was remedial legislation. It was not, however, broad remedial legislation. Rather, the 1959 amendment was intended principally to correct the Commission's decision in the Lar Daly case, *Columbia Broadcasting System (Lar Daly)*, 18 P & F Radio Reg. 238, *reconsideration denied*, 26 FCC 715, 18 P & F Radio Reg. 701 (1959).[6] *See, e.g.*, 105 Cong. Rec. 14455 (1959) (remarks of Senator Pastore) ("Let us be positive about this. Generally all we are doing is restoring the situation insofar as news is concerned to that which existed for 32 years, before the Lar Daly decision."); *id.* at 16229 (remarks of Representative Harris) ("The Lar Daly decision abandoned this traditional concept and it is the primary purpose—listen to me—it is the primary purpose of this legislation to write back into section 315 this traditional exemption from the equal-time requirement and to deal with other things that always have been thought to be exempted from the equal-time requirement.").[7] Admittedly, the amendment was not strictly limited to overruling *Lar Daly*. It also covered

> certain problems of electronic news coverage, involving the operation of section 315, other than those dealt with in the *Lar Daly* case, which should be cleared up by the Congress in this legislation simultaneously with the clarification of section 315 with respect to newscasts.

H.R. Rep. No. 802, 86th Cong., 1st Sess., 4 (1959). This congressional decision to resolve several specific problems[8] in one piece of amendatory legislation is not

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[5] *See* note 11 *infra*.

[6] Lar Daly was a perennial minor candidate for mayor of Chicago. The Commission's decision held that he was entitled to equal time because of the broadcast, as parts of regularly scheduled news programs, of various film clips which pictured Mayor Richard Daley. One of the clips showed Mayor Daley greeting the President of Argentina at the Chicago airport.

[7] *See also* 105 Cong. Rec. 14440 (1959) (remarks of Sen. Pastore) ("We are not repealing section 315. We are merely writing into section 315 an exemption which will take care of the very ridiculous situation which is presented because of the Lar Daly decision."); *id.* at 14441-14442 (remarks of Sen. Pastore); *id.* at 14450-14451 (remarks of Sen. Engle); *id.* at 14456 (remarks of Sen. Pastore); *id.* at 16224 (remarks of Reps. Budge and Brown); *id.* at 16226-16227 (remarks of Rep. Celler); *id.* at 16236-16237 (remarks of Reps. Mack and Harris); note 23 *infra*.

The reports of both the Senate and the House committees also indicate the importance both bodies attached to the *Lar Daly* decision and the need for legislation to correct that decision. *See* S. Rep. No. 562, 86th Cong., 1st Sess., 4-7 (1959); *id.* at 15 (additional views of Sen. Hartke); H.R. Rep. No. 802, 86th Cong., 1st Sess., 2-4 (1959).

[8] Overruling *Lar Daly* would technically have required only an exemption for candidate appearances on bona fide newscasts. *See* note 6 *supra*. The Commission's decision necessarily raised questions about other types of broadcasts which had traditionally been assumed to be unaffected by § 315. For example, if only regular newscasts were exempted a broadcaster would still be prevented by the *Lar Daly* decision from

the same, however, as a decision to engage in a thorough reform of the legislative framework. The 86th Congress explicitly rejected efforts at such restructuring of the equal time provision.[9]

Since Congress sought to restore what it considered a workable *status quo ante* rather than to create a new equal time provision with unknown parameters, the legislators had a clear understanding of both the types of

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treating the arrival of the President of Argentina as an event warranting special coverage outside of the limits imposed by its normal scheduling. Similarly, regularly scheduled interview programs would remain covered by the decision's rationale even if its specific holding were overruled by Congress. Congress was aware of this problem:

> Mr. MACK. * * * I would like to ask the chairman of the committee if this is not the purpose of this legislation, to restore the original intent of the Congress and the original interpretation of this basic law.
>
> Mr. HARRIS. The gentleman is correct. That is the intention of the committee. Of course, it would necessarily have to clarify some of the things that arose as a result of that decision, and that, too, to be clarified by this legislation and the legislative history of it.

105 CONG. REC. 16237. *See also id.* at 17781 (remarks of Rep. Harris). The exemption for "on-the-spot coverage of bona fide news events" was a product of this awareness and should be read, as it was intended, as part of the reversal of *Lar Daly* rather than as part of a broad reformulation of the equal time provision.

> *That is the crucial thing* in this legislation—to overrule the Lar Daly decision and to make it clear that important news events involving the appearance of a candidate may be covered on-the-spot without giving the right of equal time to other candidates.

Id. at 16230 (remarks of Rep. Harris) (emphasis added); *cf.* note 21 *infra*.

[9] *See* text accompanying notes 14-36 *infra*.

political broadcasts that definitely were not to be affected by the new exemptions and the intended role of the Commission in administering the amended section.[10] Shortly after passage of the 1959 amendment the Commission in a series of opinions [11] had no trouble finding the clear intent of Congress not to include debates and press conferences within the exemptions. Congress, for over a decade, acquiesced in that judgment.[12] But now, using

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[10] As the congressional emphasis on the need for the Commission to utilize its expertise to fill in the details of the statutory scheme through rule making shows, *see* Parts I-B, II-A *infra*, the legislators did not attempt to predetermine all questions which would arise under the amendment. They did, however, focus on certain specific questions, such as the desirability of exempting debates from the equal time rule, and they had a clearly expressed central intent not to allow unequal use of the airwaves for political campaigning. *See* Part I-A-2 *infra*. Our role is to assure that the Commission remains faithful to that "clear statutory purpose." *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 569-575 (1965).

[11] *The Goodwill Station, Inc.*, 40 FCC 362, 24 P & F RADIO REG. 413 (1962) (debate); *National Broadcasting Co. (Wyckoff)*, 40 FCC 370, 24 P & F RADIO REG. 401 (1962) (debate); *Columbia Broadcasting System, Inc.*, 40 FCC 395, 3 P & F RADIO REG.2D 623 (1964) (presidential and presidential candidate's press conferences). These decisions are all overruled by the decision under review.

[12] We must remember that we are not dealing with ordinary legislation: members of Congress are also candidates for political office. *See* text accompanying notes 84-86 *infra*. If they believed the Commission had misread their intent, no doubt they would have acted as promptly to reverse the Commission as they did after *Lar Daly*. The fact is that the Commission has repeatedly, but unsuccessfully, importuned the Congress to take such action. *See* notes 1-2 and accompanying text *supra*.

Congress is, of course, aware of the Commission's action reversing these long-standing prior decisions. *See* BROADCASTING, March 8, 1976, at 23, 65. Consideration of corrective leg-

the same legislative history 15 years after the fact,[13] the Commission has reversed itself, finding that Congress did indeed intend to allow debates and press conferences in the exemptions after all. I submit that the Commission was right when it read the legislative history the first time.

A. *The Exemption of Debates and Press Conferences*

1. *Debates.*—(a) *The Senate in 1959.*—When the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce met to consider a legislative response to the *Lar Daly* decision, it had four bills before it. Two of those bills would have exempted from the equal time requirement candidate appearances on news shows, panel discussions, debates, and "similar type programs." [14] The other two bills would have ex-

islative action has been deferred pending the outcome of the present litigation. *See* reply brief for intervenors Office of Communications of United Church of Christ *et al.* (hereinafter UCC reply br.) at A-6 (transcript of Nov. 11, 1975 oversight hearing before Subcommittee on Communications of Senate Committee on Commerce). Thus there can be no inference that Congress approves the recent decision because it has not yet acted to overrule the Commission.

[13] It is worthy of note that Commissioner Lee, the only current member of the Commission who was also on the Commission when the 1959 amendment was passed, dissented from the ruling under eview on the ground that "the majority has sidestepped the very purpose of Section 315 of the Communications Act * * *." *Aspen Institute Program on Communications*, 55 FCC2d 697, 713, 35 P & F RADIO REG.2D 49, 68, JA 141, 164 (hereinafter *Aspen*).

[14] Hearings on S. 1585 Before the Subcommittee on Communications of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., 2 (1959) (hereinafter Senate Hearings) (S. 1585, S. 1858). S. 1858, the "Fair Political Broadcasting Act of 1959," introduced by Sen. Hartke, would have completely revised § 315. S. 1585 simply added the listed exemptions to the existing law.

cluded from Section 315 only "any news program, including news reports and news commentaries, where the format and production of the program are determined by the broadcasting station * * *." [15] Much of the discussion during the committee hearings focused on establishing the differences between these two approaches and on determining what could be broadcast free of equal time obligations under the different formulations. The committee was told that the proposals restricted to exemption of news programs would not allow broadcast of debates between candidates.[16] Whether debates ought to be exempted was recognized as a major issue before the committee.[17]

The committee drafted its own bill, combining the approaches in the proposed bills, for submission to the full Senate. The committee's bill, S. 2424, exempted from Section 315(a) the "[a]ppearance by a legally qualified candidate on any newscast, news interview, news documentary, on-the-spot coverage of news events or panel discussion * * *." S. Rep. No. 562, 86th Cong., 1st Sess., 1 (1959). An exemption for debates, after having been fully considered by the committee,[18] was not recom-

[15] *Id.* at 2, 4 (S. 1604, S. 1929). All of the bills before the committee contained some form of the broadcaster control requirement quoted in text.

[16] *See, e.g., id.* at 101-105 (Mr. Stanton of CBS).

[17] *See, e.g., id.* at 261-262 (discussion between Sen. Thurmond and Sen. Keating); *id.* at 309 (statement of Dept. of Justice); *id.* at 315 (statement of American Civil Liberties Union). *See also* S. Rep. No. 562, *supra* note 7, at 15 (additional views of Sen. Hartke).

[18] The Commission argues that testimony before a committee is of little value as a guide to legislative intent. Brief for respondents (hereinafter FCC br.) at 34. The Supreme Court, however, has relied on hearings as evidence of issues with which the committee was concerned, the same purpose for

mended to the Senate.[19]

On the floor of the Senate the committee's bill was presented and discussed as a measure designed primarily to reverse the *Lar Daly* decision by exempting news programs from Section 315.[20] Senator Engle, however, objected that by including panel discussions among the exemptions the bill went too far beyond simply restoring the pre-*Lar Daly* understanding of the equal time requirement.[21] He therefore moved to eliminate the words "or panel discussions" from the bill. His argument to the Senate was that an exemption for panel discussions, like the exemption for debates already

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which I use the hearings. *See American Ship Building Co. v. NLRB*, 380 U.S. 300, 314-315 (1965). This concern supports giving greater weight to the committee's decision not to include an exemption for debates than would be warranted if the committee had not actively considered the question. *Cf. Power Reactor Development Co. v. Int. Union of Electrical etc. Wkrs*, 367 U.S. 396, 410-411 (1961) (citing as evidence that committee report's statement "must have been inadvertent" fact that witnesses had complained bill would not do what report said and committee had not changed language despite these complaints).

[19] The fact that the bill reported by the committee included an exemption for "panel discussions," S. Rep. No. 562, *supra* note 7, completely refutes the Commission's argument, FCC br. at 21-22, that debates were not specifically exempted only because the committees were focusing on types of news coverage rather than on specific formats. *See* text accompanying notes 71-75 *infra*.

[20] *See* note 7 and accompanying text *supra*.

[21] Sen. Engle also noted that the exemption for news documentaries was not necessary to reverse *Lar Daly*, but he thought "there [was] some legitimate justification" for that exemption. 105 CONG. REC. 14450.

rejected by the committee, would pose too great a danger of abuse of the broadcast media.[22]

The only strong opposition to Senator Engle's amendment was voiced by Senator Javits.[23] He identified panel discussions with face-to-face debate among candidates, urging retention of the exemption for panel discussions because of the importance of such debate to the political process:

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[22] * * * [P]anel discussions are something else again. News is a self-limiting factor. News must be current. It can be in the form of an interview or a news documentary. But it must be something of current interest; and thereby the very content of the broadcast limits the accessibility of the act and the abuse of it.

What about panel discussions? One can get into a panel discussion on anything. My opponent used a panel discussion which he paid for, he thought it was so good. Anyone who holds public office can start a panel discussion on something or other; and merely by exposing himself to the public he gets an advantage which he should not have.

I observe one other thing. Almost all the testimony was related to the matter of newscasts, not to other kinds of broadcasts.

* * * *

The Antitrust Division of the Department of Justice refused to go along with any extension into the field of panel discussions, *public debates*, and special news events.

So that broadens the case. *If there were merely public debates, there would not be any limitation whatsoever.* So the opportunities for abuse in this particular section are those which concern me the most. * * *

Id. (emphasis added).

[23] Sen. Pastore, the bill's floor manager, emphasized that his main concern was overruling *Lar Daly*. Since the exemption for panel discussions went bevond what was necessary for that purpose, he did not attempt to defend it. *See id.* at 14443, 14452.

Mr. President, I think a word needs to be said about panel discussions, which are really an integral part of the American process of debate. Before we vote on the amendment, I would like to state that it should not be adopted. I think we should preserve panel discussions, and not make the requirement ridiculous. I refer to the opportunity of Americans to hear face-to-face debate by opponents.

* * *

Let us not be wearing blinkers in terms of problems we face in daily decisions, but let us realize the broad public interest which is inherent in panel discussions.

* * * *

Mr. President, I repeat, we are venturing into an area where we are trying to change a situation which has proved to be embarrassing. In the haste of trying to do something about that situation, *let us not eliminate what I consider to be one of the great capabilities of the American people for having a knock-down, drag-out, face-to-face debate*, to wit, a panel discussion which can do them the most good.

105 CONG. REC. 14452-14453 (emphasis added).[24] Despite this plea from Senator Javits, Senator Engle's

[24] Neither Sen. Javits nor Sen. Engle, *see* note 22 *supra*, distinguished between studio and nonstudio debates, and the bill reported by the committee did not require complete broadcaster control of all the arrangements as had the proposed bills. Thus the Commission's claim that the Senate's deletion of an exemption for debates affected only studio debates, *see* FCC br. at 22-23, is erroneous.

In view of the Committee's separate treatment of debates and panel discussions, it is not clear that the senators were correct to equate the two. The important point is that, after hearing an argument in favor of the panel discussion exemption phrased in terms of the value of debate between candidates, the Senate voted to eliminate the exemption. Interestingly, the first nonstudio debate among candidates broadcast nationally since the Commission's recent ruling more closely

amendment was accepted on a voice vote and the exemption for panel discussions was eliminated from S. 2424. *Id.* at 14453.

Thus both the committee and the full Senate considered whether to include in the amendment to Section 315 an exemption for debates between candidates. Both the committee and the full Senate determined that such an exemption was not warranted. The clear basis for the full Senate's action was a belief that an exemption for panel discussions, viewed by its one proponent as including debates between candidates, would unduly expand the scope of S. 2424 beyond reversing the Commission's action in *Lar Daly*. In concluding that candidates' debates are bona fide news events within the meaning of Section 315(a)(4), the Commission has ignored the Senate's decision that such debates should not be freed of the equal time requirement.

(b) *The House in 1959.*—Like its Senate counterpart, the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce considered a range of proposals for amending Section 315 following the *Lar Daly* decision. A proposed "Fair Political Broadcasting Act of 1959" would have exempted from the equal time requirement appearances by a candidate "on any regularly scheduled or bona fide newscast, news documentary, panel discussion, debate, or similar type program * * *."[25] The bill also contemplated

resembled a "panel discussion" than a "debate." *See* Shales, *Forum Without Function*, Washington Post, Feb. 25, 1976, § C at 1 col. 1.

[25] Hearings on H.R. 5389 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., 4 (1959) (hereinafter House Hearings) (H.R. 7122). This bill was the equivalent of the Hartke bill. *See* note 14 *supra*.

significant additional changes in Section 315.[26] Another proposal was simply to exempt appearances "on any news program, including news reports and news commentaries * * *."[27] H.R. 7985, introduced by the subcommittee chairman, Oren Harris, took a middle position. Under that bill, which was ultimately reported by the committee to the full House, candidate appearances "on any news, news interview, news documentary, on-the-spot coverage of newsworthy events, panel discussion, or similar type program * * *" were excluded from the coverage of Section 315.[28] All of the bills specified that to be eligible for exemption a program must be under the exclusive control of the broadcaster.

Chairman Harris opened the hearings by describing the three categories of bills to be considered. When explaining his own bill he listed the exemptions it would establish, noting that for on-the-spot coverage of newsworthy events he "ha[d] in mind such events as national conventions of political parties." After this listing he stated, "I did not include the word 'debate,' in H.R. 7895 because I think that has connotations which go far beyond matters of this kind." Hearings on H.R. 5389 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., 2 (1959) (hereinafter House Hearings). Later in the first day of the hearings Representative Harris again stated the reason for his decision not to include an exemption for debates:

> This bill [H.R. 7895] has been changed from H.R. 6810, 84th Congress, in only one respect. That

[26] The Fair Political Broadcasting Act would, *inter alia*, have tied a presidential or vice-presidential candidate's eligibility for equal time to a required showing of support for the candidate or his party.

[27] House Hearings 3 (H.R. 5389).

[28] *Id.* at 5.

> is, the word "debate" has been stricken out. As a [*sic*] said earlier, that was done purposely because I am not sure just how you could ever define what a debate is so that a broadcast station or the Federal Communications Commission could follow it in its interpretation if we used that broad term.

Id. at 87-88.

As in the Senate committee, much of the questioning of the various witnesses was directed to developing an understanding of the extent of the proposed exemptions. Thus Representative Harris elicited from the president of the National Broadcasting Company that the exemption for coverage of newsworthy events would include such events as political conventions and the opening of a Russian exhibit attended by the President and Vice President of the United States. *Id.* at 87, 89. This interpretation of the language he had drafted was satisfactory to Representative Harris. *See id.* at 102. No one ever suggested that candidates' debates, if held outside a broadcast studio, might be "newsworthy events" within the intent of the bill. By contrast, the testimony and questioning of FCC Commissioner Ford, who unsuccessfully proposed an exemption for coverage of "special events," clearly established that the author of that language intended to include debates between candidates.[29] *E.g.*, *id.* at 93, 100.

[29] Intervenor National Broadcasting Co. (NBC) contends that Commissioner Ford's suggested exemption for special events "developed into" the language of § 315(a)(4). NBC br. at 18-20. This argument is rebutted by the fact that the two formulations were considered simultaneously by the House committee and treated as alternatives. The Ford suggestion was explicitly contrasted with the narrower proposals, such as H.R. 7985, to exempt only news broadcasts. *See* House Hearings 99-102 (remarks of Reps. Moss and Harris).

Following testimony of members of the Federal Communications Commission, the committee heard from several witnesses who supported broad exemptions from the equal time provision. Virtually every one of these witnesses, when comparing the proposals before the committee, identified failure to include debates as a key weakness of the Harris bill.[30] The committee heard vigorous advocacy of the value of political debates as a means of informing the electorate about the candidates, and of the need for an exemption to allow broadcasters to bring debates to the public.[31] The only reaction to these pleas was the expression of concern by committee members that inclusion of a wide range of program types in the exempt categories would leave little vitality in the equal time

[30] *E.g.*, House Hearings 128-129, 134-135, 138, 141, 146 (Mr. Stanton, CBS); *id.* at 171 (Mr. Fellows, National Association of Broadcasters); *id.* at 181-182 (Mr. McGannon, Westinghouse Broadcasting); *id.* at 184 (Mr. Butler, Democratic National Committee).

[31] *See id.* at 123-156 (testimony of Mr. Stanton of CBS). Mr. Stanton did not distinguish between studio and non-studio debates. *See, e.g., id.* at 134-135:

> Four years ago when we at CBS first urged modification of section 315, I pointed out that only about 75,000 people actually saw and heard the great Lincoln-Douglas debates. We felt, as we feel now, that television can provide on a nationwide basis, the modern counterpart of such great political debates, making it possible for every citizen to see and hear the candidates debating and addressing themselves to the critical issues of our time.
>
> * * * *
>
> The enactment of H.R. 7985, *if it is amended to exempt debates*, and of the fair political broadcasting bills, will make possible these programs to which I now firmly commit the CBS radio and television networks, and which, I submit, will make invaluable contributions to a quickened, informed, and intelligent democratic process.

(Emphasis added.)

requirement and give broadcasters too much discretion.[32] Not one member of the committee suggested that debates might be exempt under the Harris proposal.[33]

The committee adhered to the decision made by Representative Harris and reported to the full House a bill which did not include an exemption for debates.[34] Dis-

[32] *See, e.g., id.* at 78-79 (remarks of Rep. Flynt); *id.* at 80-82, 142, 189 (remarks of Rep. Bennett); *id.* at 84 (remarks of Rep. Moss); note 89 *infra.*

[33] If anyone had believed that debates could be covered under Rep. Harris' exemption for "on-the-spot coverage of newsworthy events," the suggestion would surely have been made during the testimony which criticized H.R. 7985 for failing to include debates. *See, e.g., id.* at 146:

> Mr. FLYNT. Now we come to the question of particular on-the-spot newscasts. Do you feel that the law would be substantially clarified if an amendment were put in to exempt news reports, newscasts, and on-the-spot news coverage?
>
> Mr. STANTON. This would be an improvement, but I think you are short-changing yourself in not going the extra distance to include debates and discussion programs.

The only examples of "newsworthy events" discussed during the hearings were political conventions, *id.* at 2, 88, 102, 156, and opening of the Russian exhibit at the New York Coliseum, *id.* at 89.

In view of the deliberate decision of the bill's drafter not to include debates, this unquestioning acceptance of the conclusion that debates were not covered by H.R. 7985 deserves great weight. *See Foremost-McKesson, Inc. v. Provident Securities Co.*, —— U.S. ——, ——-——, 44 U.S. L. WEEK 4056, 4060-4061 (Jan. 13, 1976); *cf.* note 18 *supra.*

[34] The committee did make some changes in the Harris bill, mostly in an effort to reduce its impact on the equal time principle. Thus the committee deleted the exemptions for news documentaries and panel discussions because "it was felt that these terms are difficult to define, and without proper

cussion on the floor of the House contains no suggestion on the part of any representative that debates were excluded from the equal time provision. The Commission, however, contends that none of this history demonstrates that Congress intended that debates between candidates be subject to the equal time requirement:

> * * * During the House of Representatives' floor debate, Congressman Harris noted that a number of important program categories were not specifically exempted from Section 315, but then he made the following observation:
>
> > "On the other hand, and I want you to get this, . . . the elimination *of these categories* by the committee was not intended to exclude *any of these programs* if they can be properly considered to be newscasts or on-the-spot coverage of news events."
>
> 105 Cong. Rec. 16229 (August 18, 1959). This view is consistent with the legislative history as to the other news exemptions as well.

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definition they might permit an unnecessarily broad exemption from the equal-time requirement." H.R. Rep. No. 802, *supra* note 7, at 12. Similarly, the committee omitted the "broad and indefinite category" covered by the phrase "or similar type program" and substituted the words "news events" for "newsworthy events." The latter change was made because

> [i]t was felt that the language of the introduced bill in this regard [newsworthy events] was unnecessarily vague and might result in a greater weakening of the equal-time requirement than would be desirable.

Id. at 13. In addition to these changes designed to tighten the bill, the committee also replaced the "limiting requirement" that the broadcaster or network determine the broadcast's format, production, and participants with the "more appropriate" requirement that the candidate appearance be "incidental to the presentation of news." *Id.*

Aspen Institute Program on Communications, 55 FCC 2d 697, 705, 35 P & F RADIO REG.2D 49, 60, JA 141, 153 (emphasis added) (hereinafter *Aspen*). *See also* majority op. at n.17; FCC br. at 24-25.

Representative Harris' statement cannot bear the weight the Commission places on it, for it has no reference to debates. The paragraphs immediately preceding the paragraph which the Commission and its supporters have chosen to quote make clear that Representative Harris was referring, not to debates, but to news documentaries and panel discussions:

> The Subcommittee on Communications and Power discussed the various bills at considerable length in executive session, and reported to the full committee H.R. 7985, but limited the exemption to newscasts (including news interviews) and on-the-spot coverage of newsworthy events.
>
> In other words, Mr. Chairman, the Subcommittee and the full committee decided to eliminate as separate categories *news documentaries, panel discussions, and similar type programs* as such. The committee felt—with which I agreed—that *these categories* are simply too vague and cannot be defined with sufficient definiteness.

105 CONG. REC. 16229 (emphasis added). *See also id.* at 17782.[35]

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[35] *See also* H.R. Rep. No. 802, *supra* note 7, at 12-13.

There is no suggestion in the legislative history that anyone in the House believed, as did Sens. Engle and Javits, *see* note 24 and accompanying text *supra*, that panel discussions and debates were interchangeable descriptions of the same type of occurrence. But even if this confusion had existed in the House, so that Rep. Harris' statement could be read as referring to debates, the statement would not support the Commission's conclusion that candidates' debates are "bona fide news events" if they occur outside a studio and a broadcaster chooses in good faith to put them on the air. Rep.

(c) *Summary of 1959 Legislative History.*—Both the Senate and the House committees considered bills which would have exempted candidates' debates from the equal time provision. Both committees heard vigorous testimony about the value and importance of providing an exemption for debates. Both committees refused to do so. On the floor of the House no one suggested that debates were or should be included within the exemptions. On the floor of the Senate an exemption permitting debates was eliminated by voice vote. I submit that this history shows a clear congressional intention, based on full consideration of the question, not to allow broadcast of candidates' debates free of the requirement that equal time be provided to all legally qualified candidates. Congress intended this legislative history to serve as the authoritative guide for the Commission.[36] By substituting its own judgment for the clear mandate of Congress as shown by the legislative history, the Commission has claimed power it does not possess.

Harris and the committee excluded debates and the other program categories from the bill because they were concerned to avoid broad, vague exemptions. *See* pp. 13-14 & note 34 *supra*. It belittles this concern to conclude that the deleted program categories can be made into exempt "news events" simply by the existence of a nonbroadcaster sponsoring organization.

> [T]here can be no valid distinction, under Section 315, between two broadcast programs, both involving the appearance of opposing political candidates and otherwise identical in all material respects, simply on the basis that one program was staged by a broadcaster under conditions satisfactory to the candidates, and the other program was staged by a third party and covered by the broadcaster upon invitation, also under conditions satisfactory to the candidates.

Wyckoff, supra note 11, 40 FCC at 372, 24 P & F RADIO REG. at 403 (footnote omitted).

[36] *See, e.g.*, 105 CONG. REC. 16228-16230 (remarks of Rep. Harris).

(d) *Subsequent Legislative History.*—The parties before us have extensively—one might even say exhaustively—briefed and argued the significance properly attributable to congressional action and inaction regarding Section 315 subsequent to the 1959 amendment. The Commission and its supporters, as well as the division majority, cite cases that warn against over-reliance on legislative proceedings subsequent to enactment of the law whose interpretation is at issue.[37] Petitioners and their supporters point to cases that place great weight on such subsequent events.[38] In view of the clarity of congressional purpose I find in the history of the 1959 amendment itself, I see no need to attempt to formulate a general theory of the importance of subsequent legislative history. It is, however, clear that in appropriate circumstances [39] the action and inaction of a later Con-

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[37] *E.g.*, FCC br. at 35, 38-42; CBS br. at 31-36; majority op. at 26. *Zuber v. Allen*, 396 U.S. 168 (1969), and *Power Reactor Development Co. v. Int. Union of Electrical etc. Wkrs, supra* note 18, are the two most frequently cited cases.

[38] *See, e.g.*, Chisholm br. at 65; brief for petitioner Democratic National Committee (hereinafter DNC br.) at 48-52. Petitioners place their greatest reliance on *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959); and *Kay v. FCC*, 143 U.S.App.D.C. 223, 443 F.2d 638 (1970).

[39] The Supreme Court has suggested that subsequent congressional action or inaction leaving untouched an administrative action deserves the greatest weight when there is a congressional committee charged with and engaged in the duty of exercising continuous and detailed oversight. *See Zuber v. Allen, supra* note 37, 396 U.S. at 185-186 n.21; *Power Reactor Development Co. v. Int. Union of Electrical etc. Wkrs, supra* note 18, 367 U.S. at 408. Congressional changes in other aspects of the relevant statutory provision, when combined with congressional awareness of the administrative action, also add weight to the implication that Congress did not reverse the disputed action because it agreed with that

gress can be "an added circumstance which has some persuasive weight * * *," *Kay v. FCC*, 143 U.S.App.D.C. 223, 231, 443 F.2d 638, 646 (1970), with regard to the intended meaning of a statute. Since circumstances in this case are appropriate for according at least "some persuasive weight" to events after 1959,[40] I will briefly consider later congressional treatment of Section 315(a).

Both sides attach the greatest importance to interpreting the action of the second session of the 86th Congress —the Congress which wrote the 1959 amendment—in suspending Section 315(a) for the 1960 presidential campaign.[41] *See* S. J. Res. 207, 86th Cong., 2d Sess. (1960) (Pub. L. No. 86-677, 74 STAT. 554). Petitioners main-

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action. *See NLRB v. Bell Aerospace Co.*, *supra* note 38, 416 U.S. at 288; *Farmers Educational & Cooperative Union v. WDAY, Inc.*, *supra* note 38, 360 U.S. at 533 & n.15.

[40] Administration of the equal time requirement is, naturally, an area of great concern to the elected politicians in Congress. *See* text accompanying notes 85-86 *infra*. Accordingly, congressional committees maintain careful vigilance over the Commission's actions regarding § 315, *see* notes 12 *supra*, 48 *infra*, and the Commission is required to call its important equal time decisions to Congress' attention. *See* p. 56 *infra*. The majority denigrates this congressional concern as "technical" awareness of the Commission's actions, majority op. at 27, but the Supreme Court has recognized that Congress' interest in § 315 is significant. *See Farmers Educational & Cooperative Union v. WDAY, Inc.*, *supra* note 38, 360 U.S. at 533 & n.15.

[41] The 1960 suspension is important because the congressional understanding of the need for and impact of that suspension indicates what the Congress that passed the 1959 amendment believed not to be covered by that amendment. It is also important because the Commission relied on the 1960 suspension when it ruled in 1962 that debates could not be considered "bona fide news events." *See The Goodwill Station, Inc.*, *supra* note 11, 40 FCC at 363-364; *Wyckoff*, *supra* note 11, 40 FCC at 372.

tain that since the purpose of this suspension was to allow the "Great Debates" between Democrat John F. Kennedy and Republican Richard M. Nixon, passage of the Joint Resolution constitutes an authoritative congressional declaration that debates were not exempted by the 1959 amendment.[42] The Commission's response, accepted by the majority here, is twofold. First, the Commission argues that "the 1960 legislation had no special relevance to the coverage of debates [since t]he legislation was intended to apply to *any* appearance by the Presidential candidates regardless of format[.]" 55 FCC 2d at 706, 35 P & F RADIO REG.2D at 60, JA 153 (emphasis in original). *See* majority op. at 24-25. Second, the Commission contends that Congress enacted the suspension because the Commission had not yet acted "to clarify the meaning of the exemptions." 55 FCC 2d at 706, 35 P & F RADIO REG.2D at 60, JA 154. *See* majority op. at 25.

Neither of these arguments can withstand examination. Although it is true that the 1960 suspension did not specify that debates must be held, it is also clear that debates were expected to be one result of the Joint Resolution. *See* 106 CONG. REC. 14473 (1960) (remarks of Senator Pastore); *id.* at 17036-17037 (remarks of Representative Harris); *id.* at 17039 (remarks of Representative Springer). Moreover, the broadcasters told Congress they could not practicably present debates unless Section 315 were suspended, and Congress acted on that basis. *See* S. Rep. No. 1539, 86th Cong., 2d Sess., 3-5 (1960); 106 CONG. REC. at 14473 (statement of Senator Pastore); *id.* at 17037 (remarks of Representative Harris); *id.* at 17039 (remarks of Representative Springer). That the suspension additionally allowed programs other than debates, or that programs already exempt under the 1959 amendment were also presented, does not affect the validity of the inference, clearly supported by the legislative history of the suspension provision, that Congress believed

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[42] Chisholm br. at 40-44.

suspension of Section 315(a) was necessary to allow broadcast of debates between the two major candidates for the presidency.

The Commission's second argument depends on its assertion that when Senator Pastore said, "Not enough time has elapsed to permit full evaluation of [the 1959] amendment," he meant to say that the Commission had not yet had time to define the scope of the exemptions. I see nothing in the context [43] or wording of Senator Pastore's remarks to support this interpretation of his statement. The majority, apparently recognizing this difficulty, rewords the argument:

> • • • [T]he Senate Report accompanying the Joint Resolution [44] stated that one reason for the suspension was that the Commission had not yet had sufficient time to interpret the new exemptions; consequently, the across-the-board suspension was de-

[43] *See* 106 CONG. REC. 14473 (1960); S. Rep. No. 1539, 86th Cong., 2d Sess., 2 (1960).

[44] S. Rep. No. 1539, *supra* note 43, uses the same language as Sen. Pastore, who apparently based his statement to the Senate on the committee report. The relevant portion of the report states:

> Last year's amendments to the Communications Act were the first major modifications of the equal opportunity provisions since the adoption of the Radio Act in 1927. Not enough time has elapsed for a full evaluation of this amendment. However, this liberalization should lead to a fuller and more meaningful news coverage of the actions and appearances of legally qualified candidates. Your committee recognizes that the changes of the last session have not been perfect. It was a cautious move into an uncharted area but sound, commonsense administration on the part of the Federal Communications Commission is essential to avoid the obstacles that may lead to abuse.

Id. at 2.

> signed, at least in part, to provide time for necessary evaluation of the effects of the amendments.

Majority op. at 25. In addition to misstating the Senate report,[45] this revised version is illogical: suspension of the entire equal time provision for presidential candidates would not facilitate evaluation of the impact of amendments which created some exemptions to that provision.

I therefore conclude, as the Commission itself concluded in its prior opinions,[46] that the 1960 suspension of Section 315 (a) provides additional evidence that the 86th Congress believed that debates were not exempted from the equal time requirement by the 1959 amendment.[47] Later Congresses also appear to have shared this understanding of Section 315(a). However, in view of the length of this dissent and of the cumulative nature of the support to be drawn from the post-1960 history, I will rest on the citations to the legislative history in the margin.[48]

[45] *See* note 44 *supra*.

[46] *See* note 41 *supra*.

[47] The Commission's inability adequately to explain why it has rejected the view of the 1960 congressional action it found convincing a mere two years after the event, *see* note 41 *supra*, is indicative of the Commission's failure to provide a sufficient explanation for reversing its prior holdings. *See* Part II-B *infra*.

[48] Since 1960 Senate and House committees have held a total of at least 12 hearings dealing with political broadcasting and § 315. *See* Chisholm br. at 44-60. In 1971, *see* Pub. L. No. 92-225, §§ 103(a)(1), (2)(B), 104(c), 86 STAT. 4, 7, and again in 1974, *see* Pub. L. No. 93-443, § 402, 88 STAT. 1291, Congress amended § 315 without disturbing the Commission's rulings. While these legislative actions may not be technical reenactments, *see* FCC br. at 39-42, they provide some support for the proposition that Congress agreed with the Commission's position. *See NLRB v. Bell Aerospace Co.*, *supra* note 38, 416 U.S. at 275, 288 (noting that

2. *Press Conferences.*—In contrast to its explicit concern with candidates' debates, the 86th Congress did not focus on press conferences when considering the 1959 amendment. The absence of discussion of press conferences in the 1959 legislative history [49] does not, however, mean that the Commission is free now, particularly after its long-standing decision to the contrary and its repeated subsequent unsuccessful efforts to have Congress change Section 315, to determine that candidates' press conferences, as such,[50] are bona fide news events

Congress "let stand" NLRB's definition of "managerial employees" when it passed the Labor-Management Reporting and Disclosure Act, 73 STAT. 519 (1959), which neither reenacted the National Labor Relations Act nor amended the latter Act's definitional provisions).

[49] Press conferences were not explicitly considered in the discussion of the 1960 suspension of the equal time provision for the presidential campaign. Following the Commission's decision in *Columbia Broadcasting System, Inc., supra* note 11, of which Congress was officially informed in the Commission's annual report, FEDERAL COMMUNICATIONS COMMISSION, 31ST ANNUAL REPORT FOR THE FISCAL YEAR 1965 at 86, the subsequent history of congressional acquiescence is the same as for the debate decisions. *See* note 48 *supra.*

[50] The Commission has long recognized an exception to § 315 for speeches to their constituents by elected leaders, who happen to be candidates for reelection, concerning current events of critical importance. *Republican National Committee*, 40 FCC 408, *affirmed by equally divided court, sub nom. Goldwater v. FCC*, No. 18,963 (D.C. Cir. Oct. [illegible] 1964), *cert. denied*, 379 U.S. 893 (1964) (presidential addresses concerning Chinese nuclear explosion and Soviet leadership change); *Public Notice 38387*, 40 FCC 276 (1956) (presidential address concerning Suez crisis). An analogous exemption for press conferences triggered by and limited to a specific important event might also be appropriate. By its nature such an exemption could be invoked only infrequently, and it could not be used for generalized campaigning. *Cf.* note 22 *supra* (remarks of Sen. Engle).

CBS attempts to support the Commission's ruling by noting the reasons for an exemption for a press conference

which may be broadcast free of equal time obligations under Section 315(a)(4). To the contrary, I am convinced that candidates' press conferences were not discussed by Congress in 1959 because they are so clearly within the core of Section 315's purpose—a purpose reaffirmed in 1959—that the possibility that they might or should be exempted by the amendatory legislation was not deemed worthy of mention. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-284 (1974).[51] By holding otherwise the Commission has exceeded the limits of the authority delegated to it by Congress.

The central purpose of Section 315 is to assure that if one candidate is allowed to use the public airwaves as a platform from which he can plead for votes, all other

keyed to an extraordinary event. CBS br. at 10-12. The Commission has not, however, so limited its ruling. Moreover, the Commission's requirement that broadcasts be live in order to qualify under § 315(a)(4) has the curious result of requiring the broadcaster to decide in advance whether to air a press conference (or debate) without knowing what will occur. Thus the Commission requires the broadcaster to act on the basis of the newsworthiness of the candidate, not of the event about which the candidate will speak. The CBS argument fails to recognize these differences between the narrow exemption that might be justified and the sweeping exemption the Commission has created. As the Commission itself noted in 1964, "Exemption of such *extraordinary reports* does no violence to the thrust or scheme of Section 315 * * *." *Republican National Committee, supra*, 40 FCC at 410 (emphasis added). *See also* note 63 *infra.*

[51] In *Bell Aerospace* the Court noted the existence of a category of persons "so clearly outside the [National Labor Relations] Act that no specific exclusionary provision was thought necessary." 416 U.S. at 283. The category with which the Court was concerned was not even specifically mentioned in the legislative history.

legally qualified candidates will receive an equal opportunity to use that singularly effective platform.[52]

> [T]he fundamental objective of [Section 315] was to require any licensee who had allowed any legally qualified candidate to use his facilities to afford equal opportunity to all other candidates for that same office. Its basic purpose was to require equal treatment by broadcasters of all candidates for a particular public office once the broadcaster made a facility available to any one of the candidates. This was a sound principle and the committee reemphasizes its belief in that objective. * * *

S. Rep. No. 562, *supra*, at 8. Congress recognized that broadcast facilities can be made available to a candidate although they are not formally placed under his control by being sold or donated to him.[53] The clearest example

[52] *See* Senate Hearings 261 (remarks of Sen. Keating) (panel discussions, debates, or similar programs "are informational, platform-type shows where indirect appeals for votes are made. As such, all substantial candidates deserve an opportunity to be heard.").

[53] CBS suggests that the core concern of § 315 is with sold or donated time, and that the Commission's decision should therefore not be viewed as substantially weakening the equal time principle. CBS br. at 29. The only support CBS cites for this contention is the statement in the Senate Report that

> [t]he equal time provision of section 315(a) was designed to assure a legally qualified candidate that he will not be able to acquire unfair advantage over an opponent through favoritism of a station in selling or donating time *or in scheduling political broadcast.* * * *

S. Rep. No. 562, *supra* note 7, at 8-9 (emphasis added). However, as the emphasized phrase indicates, even this sentence suggests that Congress was concerned with more than sold or donated time. Moreover, as the legislative history discussed in text and note 54 *infra* demonstrates, "traditional campaign efforts to persuade the electorate to vote one way

of such a "use" of broadcast facilities, mentioned in the legislative history only to illustrate the type of event definitely not affected by the 1959 amendment, is when a station on its own broadcasts a set political stump speech or a staged political event.[54] Press conferences, which can be opened with an uninterrupted statement of any length the candidate chooses and which can be used to deliver pre-rehearsed "answers" to selected questions,[55] are within this clearly nonexempt category.

Differentiating between set political speeches and staged political events, on the one hand, and "bona fide news events," on the other, is a task which could, of course, become difficult at the margins. Congress did, however, identify factors which should be considered when

or another * * * [are] the first and foremost concern" of § 315. Brief for intervenor American Broadcasting Companies (hereinafter ABC br.) at 21.

[54] *See, e.g.*, H.R. Rep. No. 802, *supra* note 7, at 6 ("as a matter of principle, it is not the intention of the committee that staged incidents or stump speeches be considered 'news' within the context of this legislation."); 105 CONG. REC. 16232 (remarks of Mrs. May); *id.* at 16236 (remarks of Rep. Macdonald) ("staged events such as a candidate pictured visiting a long established factory or oil refinery * * * and * * * shaking hands with workers should not be viewed as news but as a staged event"); Senate Hearings 219 (remarks of Sen. Pastore) ("For instance, if it was an outright political speech or political appearance the candidate made, then I think you would want to protect the candidates."); *id.* at 261 (remarks of Sen. Keating); House Hearings 128 (testimony of Mr. Stanton of CBS) ("The campaign speeches are unaffected by these provisions, so far as they are concerned, such appearances remain subject to the full sweep of the equal time requirements."); *id.* at 135, 138 (same).

[55] *See, e.g., Columbia Broadcasting System, Inc. v. FCC*, 147 U.S.App.D.C. 175, 188-189, 454 F.2d 1018, 1031-1032 (1971); Washington Post, March 5, 1976, § A at 1 col. 4; Washington Star, Feb. 18, 1976, § A at 1 col. 3.

determining on which side of the line a particular event, or type of event, falls. Consideration of those factors demonstrates that candidates' press conferences do not present a close question.

To distinguish "an outright political spech or political appearance the candidate made," Hearings Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1585, 86th Cong., 1st Sess., 219 (1959) (remarks of Senator Pastore), from an event which could be broadcast without providing equal opportunities to other candidates, Congress focused on two aspects of the event. The first consideration is the degree to which the event is staged by the candidate:

> It is natural that during campaign periods political candidates will do their best to see to it that incidents in their campaigns, including speeches, are news and thus are covered by ali important news media. However, as a matter of principle, it is not the intention of the committee that staged incidents or stump speeches be considered "news" within the context of this legislation.

H.R. Rep. No. 802, *supra*, at 6.[56] An alternative although not precisely complementary manner of expressing this

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[56] Although the quoted statement is taken from the portion of the House report dealing with news broadcasts, the report stated that the same considerations apply "with even greater force to on-the-spot coverage of news events." H.R. Rep. No. 802, *supra* note 7, at 6. The quoted paragraph follows the report's statement that the requirement that candidate appearances be "incidental to the presentation of news" encompasses several factors, but the statement of principle does not itself appear to be an aspect of the "incidental to" test. Nothing in the legislative history of the deletion of the "incidental to" test suggests that that action was meant to negate the exclusion of "staged incidents or stump speeches" from the scope of the 1959 amendment. *See* text accompanying notes 87-89 *infra;* note 61 *infra.*

aspect of the inquiry is to consider the extent to which the format and content are under the control of the broadcaster. The legislative history contains many references to this formulation.[57] The second distinguishing element identified by Congress is the purpose of the event and the candidate's appearance at it. If the event is designed to improve the candidate's chances, and the candidate's appearance is thus for the purpose of furthering his candidacy, it is unlikely that the event is bona fide news.[58]

Both the Commission and the majority find these factors unhelpful and therefore reject their relevance. Their argument is premised on the observation that candidates hope and expect that their chances will be improved when-

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[57] *See, e.g.*, 105 CONG. REC. 16225 (remarks of Rep. Brown); notes 14-15, 28 *supra* and accompanying text. As the Senate Report explained:

> It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and *in almost every instance the format and production of the program is under the control of the broadcast station,* or the network in the case of a network program.

S. Rep. No. 562, *supra* note 7, at 11 (emphasis added). It is curious that the Commission's insistence on limiting its holding to nonstudio debates somehow reverses the congressional presumption. *See also* notes 24, 31 *supra,* 68, 107 *infra.*

[58] The conference report stated:

> In the conference substitute, in referring to on-the-spot coverage of news events, the expression "bona fide news events" instead of "news events" is used to emphasize the intention to limit the exemptions from the equal time requirement to cases where the appearance of a candidate is not designed to serve the political advantage of that candidate.

H.R. Rep. No. 1069, 86th Cong., 1st Sess., 4 (1959). *See also* note 59 *infra.*

ever they are seen or heard on a broadcast,[59] and that the content and format of a political convention, explicitly defined as a "bona fide news event" in the 1959 amendment, are not within the control of the broadcaster. They also note that a candidate's acceptance speech is obviously intended to further the candidacy being accepted. Majority op. at 20-21 and n.22; 55 FCC 2d at 705 n.10, 35 P & F RADIO REG.2D at 59 n.10, JA 152 n.10. Based on these observations, they conclude that Congress could not have meant the factors discussed above to control the determination whether an event is a "bona fide news event."

This argument incorporates a crucial *non sequitur*: because neither factor can serve as a litmus test for distinguishing all exempt events from all nonexempt events, the Commission and the majority conclude that neither

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[59] The Commission concludes from this observation that Congress must have been focusing on the intent of the broadcaster rather than on the intent of the candidate. *See Aspen*, 55 FCC 2d at 705 n.10, 35 P & F RADIO REG.2D at 59 n.10, JA 152 n.10; FCC br. at 25-26. The following colloquy between Sens. Proxmire and Pastore shows that the Commission's conclusion is plainly erroneous:

> Mr. PROXMIRE. I should like to ask the Senator, in connection with the bill, if it is not true that what the bill does is to make an exception to section 315(a) in the case of an appearance by a candidate on a newscast.
>
> Mr. PASTORE. That is correct, provided he did not initiate the newscast, provided *he* did nothing affirmatively to advance *his* own candidacy—in other words, if his appearance was a part of the information being given to the public as a newscast.
>
> Mr. PROXMIRE. Is that language in the bill, or is that the interpretation of the Senator from Rhode Island?
>
> Mr. PASTORE: That is the interpretation of the junior Senator from Rhode Island in making the legislative history on this amendment.

105 CONG. REC. 14446 (emphasis added).

consideration, evaluated in isolation or together, is of any value. Yet it is simply not true that, because a candidate hopes to be assisted by any broadcast appearance, inquiring whether the event is created for that purpose and whether the candidate's participation in it is an element of the campaign will be of no assistance. For example, the incumbent candidates who participated in the nationally broadcast inquiry into the impeachment of President Nixon can be assumed to have hoped that their positions and performances would aid their campaigns. Yet the impeachment inquiry[60] can be readily distinguished from a campaign event by noting that it served a purpose independent of any campaign and that, whatever their hopes, the incumbent candidates' appearances were part of their legislative duties.[61]

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[60] The example of the impeachment inquiry should assuage the Commission's fear that if it looked beyond the broadcaster's intent "no political event could be covered except the most innocuous ribbon-cutting ceremony." 55 FCC 2d at 705 n.10, 35 P & F RADIO REG.2D at 59 n.10, JA 152 n.10. It is interesting to note that the Public Broadcasting System broadcast the impeachment inquiry on a delayed basis to allow daytime workers to watch the proceedings. *See* notes 68, 107 *infra*.

[61] *See* Chisholm reply br. at 6 ("the critical distinction is between an appearance of a candidate *in* a bona fide news event and appearance of a candidate *as* the news event itself." (emphasis in original)). This analysis is not the same as a test which turns on whether the candidate's appearance is "incidental to" or central to the event, but it admittedly has some echoes of such a criterion. This is not disturbing since, as Rep. Harris told the House, the "incidental to" language added to the bill by the full committee was "merely interpretive" of the bill's provisions. 105 CONG. REC. 16230. When that test was eliminated from the bill because Congress feared that its legislative formulation would prove unworkable, no change was wrought in the underlying purpose of either the 1959 amendment or the basic equal time provision. *See* notes 87-89 *infra* and accompanying text. *See also* 105 CONG. REC. 17781

Similarly, the degree of candidate control, while not always decisive, can serve as a useful guide to classifying events. For example, although the content and format of the impeachment inquiry were not determined by or under the control of the broadcasters, neither was the inquiry under the control of any candidate.[62] This factor thus helps distinguish the impeachment hearings from

(remarks of Rep. Harris) (only "major difference" between bill reported by conference committee and House bill is inclusion of exemption for regularly scheduled interview programs).

[62] Congress recognized that this would often be the case with news events given "on-the-spot coverage," *see* H.R. Rep. No. 802, *supra* note 7, at 7. Congress nevertheless believed that the degree of candidate or broadcaster control could be a useful indicator of whether an occurrence is a "news event" or a "staged political event." The majority's conclusion that "a candidate's partial control over a press conference or debate does not, *by itself*, exclude coverage of the event from Section 315(a)(4)," majority op. at 21 (emphasis added), is not inconsistent with this legislative history. However, the majority fails to explain its justification for completely ignoring this factor.

The Commission, FCC br. at 24, and intervenors, *e.g.*, NBC br. at 17-18 n.5, argue that if excerpts of an event can be broadcast on a regular news program without triggering the equal time provision, on-the-spot coverage can also be provided without creating an equal time obligation. The congressional recognition that news events covered on the spot are especially susceptible of abuse, *see* H.R. Rep. No. 802, *supra*, at 7, indicates the error in that argument. The statute itself refutes the contention that if excerpts may be broadcast under § 315(a)(1) the entire event may be broadcast under § 315(a)(4). Section 315(a)(1) requires only that the *newscast* be bona fide; it says nothing about the events covered on that newscast. Section 315(a)(4), of course, requires that the *news event* be bona fide. *See also Columbia Broadcasting System, Inc.*, *supra* note 11, 40 FCC at 396, 3 P & F RADIO REG.2D at 625; *Wyckoff*, *supra* note 11, 40 FCC at 371, 24 P & F RADIO REG. at 402.

the stump speech, the paradigm of the nonexempt event. The same observation can be made for most aspects of a political convention."[63]

The inadequacy of the majority's analysis is also demonstrated by consideration of the "common sensical point of view" it substitutes for the criteria identified by Congress. Majority op. at note 20. This approach, which is what the Commission's rationale reduces to, notes that "the inherent newsworthiness of speeches and debates seems no greater or less than that of 'political conventions and activities related thereto,'" citing as proof the coverage of such events by the print media. *Id.* at 20. Such reasoning ignores the House committee's decision to substitute the phrase "news events" for the phrase "newsworthy events" because the latter wording "might result in a greater weakening of the equal-time requirement than would be desirable."[64] More importantly, as the majority apparently recognizes and accepts,[65] use of this

[63] An acceptance speech, which is clearly within § 315(a)(4), is completely within the control of the candidate. This fact does not invalidate the preceding analysis. An acceptance speech is a unique occurrence which culminates a political convention. An exemption motivated primarily by a desire to assure that the *Lar Daly* decision did not prevent broadcast of such conventions, *see* note 33 *supra*, would be incomplete if acceptance speeches were not included. Moreover, unlike press conferences which can be called at the candidate's pleasure, an acceptance speech can occur only once during a campaign. *Cf.* note 22 *supra* (remarks of Sen. Engle); note 50 *supra*. Congressional recognition of these distinctions among types of events should not be treated as a license to treat all events as if they were alike.

[64] *See* note 34 *supra*.

[65] *See* majority op. at 20 ("the inherent newsworthiness of *speeches* and debates" (emphasis added)). The majority compares speeches and debates to "political conventions and activities related thereto" and concludes that since the latter are exempt the former must also be exempt. *Id.* This argument is fallacious. *See* note 63 *supra*.

"common sensical" standard would allow broadcast, free of the equal time requirement, of any of a major candidate's vote-seeking activities. It is certainly true that print and broadcast journalists accompany the leading candidates for high office, especially if the incumbent is among them, wherever they go and whatever they do.[66] Likewise, the visit of such a candidate, and especially of an incumbent, would almost certainly be considered a local happening of great importance and interest.[67] Thus, under the approach adopted by the Commission and ratified by the majority, a broadcaster whose motivation was not partisan could provide live coverage of all of a candidate's local handshaking and speechmaking and not be subject to the equal time requirement.

Congress did not intend to open such a broad gap in the coverage of the equal time provision.[68] To avoid doing so

[66] *See, e.g.*, Washington Post, Feb. 16, 1976, § A at 1 col. 1.

[67] The same observations would be true, although to a lesser degree, of candidates for lesser and local offices.

[68] *See* text accompanying notes 6-9, 14-36 *supra*. Recognition that the Commission's decision is inconsistent with the purpose of Congress may account for the strained and unconvincing efforts to demonstrate that the Commission's ruling is narrowly limited to nonstudio debates and press conferences broadcast live and in their entirety. 55 FCC 2d at 707, 35 P & F RADIO REG.2D at 62, JA 156. Although the majority apparently recognizes the true breadth of the Commission's decision, *see* note 65 *supra*, it generally ignores this insight. *See* majority op. at 27. The intervenors on behalf of the Commission are not so hesitant; taken together, they attack all of the purported limitations on the Commission's decision as unsupported by the statute, the legislative history, or the Commission's reasoning. *See* br. for intervenor Radio Television News Directors Association (RTNDA) at 15 n.32 (requirement that coverage be live and in entirety "not supported by legislative history, journalistic ethic, or logic."); NBC br. at 28 n.12 (delayed broadcast would be exempt); CBS br. at 9 (broadcast of any candidate debates exempt); ABC br. at 20 & n.21 (question-

it created exemptions to Section 315 which were "restricted * * * to well defined categories[,]" 105 CONG. REC. 14440 (remarks of Senator Pastore), and it set forth criteria by which the content of those categories could be determined. The criteria to be used for determining whether an event is a "bona fide news event" within the meaning of Section 315(a)(4) are control and purpose. As to the former the candidate alone determines the timing, duration, format, and to a large degree the content[69] of a press conference. As to the latter the press conference is a part of the campaign, used to solicit votes, through the press, from a wider electorate than the candidate can reach through personal campaigning. Thus consideration of the criteria identified by Congress reveals that a candidate's press conference closely resembles a stump speech;[70] as such, it is a staged political event, not a "bona fide news event," and it is not within the fourth exemption to the equal time requirement of Section 315.[71]

3. *Conclusion.*—The Commission now argues, contrary to its prior opinions, that all of this legislative history

ing requirement that press conference be broadcast live and in entirety; noting that speech would be exempt in same circumstances as debate). *See* notes 24, 31, 50, 57, 60 *supra*, 107 *infra*.

As I have shown, the legislative history conclusively bars the Commission from adopting the specific holdings now before us. Appreciation of the actual scope of the Commission's decision fortifies my conviction that the Commission has unlawfully assumed power to rewrite its governing statute.

[69] *See* materials cited in note 55 *supra*.

[70] Application of these criteria to debates shows that they too are campaign events, not news events.

[71] I agree with the Commission's holding, not challenged here, that press conferences are not exempt as "bona fide news interviews" under § 315(a)(2).

is irrelevant. It claims that the failure to include references to debates and panel discussions in the 1959 amendment as enacted shows only that "[t]he committees chose to focus on general types of news coverage rather than attempt to draft a specific list of particular events which might qualify as exempt." [72]

This argument is untenable. The language of Section 315(a)(4) specifies *both* a type of coverage—on-the-spot—and a type of event—bona fide news events. Congress devoted a great deal of effort to considering what a bona fide news event would be.[73] This consideration, which was expected to guide the Commission's administration of the 1959 amendment,[74] resulted in a deliberate congressional decision to leave candidates' debates subject to the equal time rule. It also provided guidelines for dis-

[72] FCC br. at 21. The brief follows this statement with a quotation from the legislative history:

> "The pending bill refers only to the type of political *reporting* that radio and television stations indulge in without having to provide equal time." Remarks of Rep. Celler, 105 Cong. Rec. 19226, Aug. 18, 1959 (emphasis added).

Id. In context Rep. Celler's statement is as follows:

> The remarks of the gentleman from Missouri were addressed to the question of prime hours on radio and television with relation to chains. That matter is quite alien to the subject matter of the instant bill.
>
> The pending bill refers only to the type of political reporting that radio and television stations indulge in without having to provide equal time. It is quite different than the subject of prime hours.

105 CONG. REC. 16226 (1959).

[73] *See* note 19 *supra.*

[74] *See* Parts I-A-1, I-A-2 *supra.*

[75] *See, e.g.,* 105 CONG. REC. 16228-16230 (remarks of Rep. Harris); Parts I-B, II-B-1 *infra.*

tinguishing "staged political events" from "bona fide news events." The Commission has no right to disregard these congressional determinations.

B. *The Delegation to the Broadcasters*

Although the Commission has, in terms, limited its declaratory order, *Aspen* establishes a new standard for determining whether a broadcast in which a candidate appears is within the 1959 amendment's exemptions from the equal time requirement. That standard effectively makes the broadcaster the judge of the reach of the equal time obligation:

> • • • Congress intended that the Commission would determine whether the broadcaster had in such cases made reasonable *news judgments* as to the newsworthiness of certain events and of individual candidacies and had afforded major candidates broadcast coverage. Conference Report, H. Rep. No. 1069, 86th Cong. 1st Sess.[76]

[76] Nothing in the conference report warrants the Commission's reliance on that document as support for its standard of deference to broadcaster judgment in determining what types of events fall within § 315(a)(4). The only reference to "news judgment" in the conference report occurs in the following paragraph dealing with news interviews (§ 315(a)(2)):

> It is intended that in order for a news interview to be considered "bona fide" the content and format thereof, and the participants, must be determined by the licensee in the case of a news interview originating with the licensee of a station and by the network in the case of a news interview originating with a network; and the determination must have been made by the station or network, as the case may be, in the exercise of its "bona fide" news judgment and not for the political advantage of the candidate for public office.

H.R. Rep. No. 1069, *supra* note 58, at 4. This statement was part of a restrictive test established by the committee for

55 FCC 2d at 705, 35 P & F RADIO REG.2D at 59, JA 153 (emphasis in original).[77] The Commission's review, under this standard, is extremely limited:

> The Commission reviews only whether or not the broadcaster intends to promote the interest of a particular candidate in presenting coverage of a news event.

55 FCC 2d at 711 n.19, 35 P & F RADIO REG.2D at 66 n.19, JA 161 n.19. Thus, so long as the licensee cannot be shown[78] to have decided to broadcast a particular

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determining whether a program comes within the exemption created by § 315(a)(2). The Commission recognized the restrictiveness of that test in the present proceeding when it held that press conferences are not "bona fide news interviews." *See* 55 FCC 2d at 708-710, 35 P & F RADIO REG. 2D at 63-65, JA 157-159. The conference committee also emphasized its intention to limit the exemption created by § 315(a)(4):

> In the conference substitute, in referring to on-the-spot coverage of news events, the expression "bona fide news events" instead of "news events" is used to emphasize the intention to limit the exemptions from the equal time requirement to cases where the appearance of a candidate is not designed to serve the political advantage of that candidate.

H.R. Rep. No. 1069, *supra*, at 4.

[77] *Accord*, 55 FCC 2d at 708, 35 P & F RADIO REG.2D at 63, JA 157.

[78] A candidate will apparently have to provide extrinsic evidence of broadcaster bad faith in order to prevail on an equal time claim under the Commission's new approach. *See Kay v. FCC*, *supra* note 38, 143 U.S.App.D.C. at 227 n.9, 443 F.2d at 642 n.9; NBC br. at 34; brief for *amici* Aspen Institute Program for Communications & Society and Common Cause (Aspen br.) at 17 n.29. *Amici* suggest that testimony of a station employee would suffice. Aspen br. at 17 n.29. They do not suggest how a victimized candidate can be expected to uncover such testimony and present it to the

event for the purpose of advancing a candidate's interest, he is free[79] to choose to broadcast any political event he wishes[80] with no obligation to provide equal time to opposing candidates. As the Commission recognized in its earlier decisions, this approach to Section 315(a)(4) would render meaningless the other three exemptions in Section 315(a) and "would also largely nullify the objectives of Section 315 • • •." *National Broadcasting Co. (Wyckoff)*, 40 FCC 370, 371, 24 P & F RADIO REG. 401, 402 (1962).

> [I]f we were to construe subsection (a)(4) as encompassing all coverage of a candidate deemed newsworthy by the licensee, it would mean that the equal opportunities requirement of Section 315, in effect, had been repealed—that the licensee, in the exercise of his good faith news judgment, could cover the speeches, press conferences, indeed any and all appearances of a candidate, without bring-

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Commission in time for the Commission (and the courts) to act before the election is over.

Amici also contend that the fairness doctrine now provides significant backup relief. *Id.* at 22-26; *see* 55 FCC 2d at 708 & n.18, 35 P & F RADIO REG.2D at 62 & n.18, JA 156 & n.18. This argument has two glaring weaknesses. First, since the Commission's new equal time standard incorporates the fairness doctrine's approach of deference to the broadcaster, *see* note 81 *infra*, it is difficult to understand how that doctrine can assist a candidate whose equal time remedy has been eliminated by adoption of the deferential standard. Second, even *amici* acknowledge that the fairness doctrine is potentially helpful only to the candidates of the major parties. *See* Aspen br. at 22-26.

[79] The broadcaster's freedom is subject to the limited restraints created by the possibilities that an opposing candidate will be able to uncover extrinsic evidence that the broadcaster was serving partisan interests or that the fairness doctrine will be invoked. *See* note 78 *supra*.

[80] *See* notes 24, 31, 57, 60, 68 *supra*, 107 *infra*.

ing into play the equal opportunities requirement.

* * *

Columbia Broadcasting System, Inc., 40 FCC 395, 398, 3 P & F RADIO REG.2D 623, 627-628 (1964).

I believe it is clear that Congress, in enacting the 1959 amendment to Section 315, had no intention of establishing exemptions from the basic principle of equal time definable only in terms of the judgment of the broadcasters.[1] As I have demonstrated, the legislators engaged in extensive discussions of whether particular types of activities would fall within the proposed exemptions to the equal time requirement. *See* Part I-A *supra*. The purpose of these discussions was not only to educate the legislators about the measure they were considering, but also to establish guidelines for the Commission's administration of the revised Section 315.[2] This effort to explain to the Commission the intended content of the exemptions, including that for "bona fide news events," would make no sense if Congress intended that the definition of a bona fide news event was to be left in the hands of the interested broadcaster. Indeed, Congress explicitly rejected making broadcaster judgment even an aspect of the definition of a bona fide news event. As the Senate Report explained, one of the bills before the committee contained a provision

> limiting the exempted programs to those *where a broadcaster was required to act in good faith in determining what was a newsworthy event* and in no way designed to advance the cause of or discriminate against any candidate.
>
> The committee was impressed by this approach and intended to adopt similar language in reporting legislation. However, the Federal Communications Commission urged this committee to eliminate any such provision on the ground that it would lead to protracted litigation as to what constitutes news, news interviews, news documentaries, and on-the-spot coverage of news events or panel discussion. Indeed, the Federal Communications Commission, in its letter dated July 2, 1959 * * *, stated:
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> * * * *
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> "It would be much better for the Commission to cope with a single problem of developing interpretations as to what constitutes 'news, news interviews, news documentary, on-the-spot coverage of newsworthy events, panel discussions, or similar type program' without being required to determine the merits of a defense that even though not a newscast, etc., the broadcaster in good faith intended it to be a bona fide newscast."

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[1] This specific congressional rejection of a standard of reliance on broadcaster discretion differentiates this equal time case from cases under the fairness doctrine in which such a standard has been held appropriate. *See, e.g., Straus Communications, Inc. v. FCC*, —— U.S.App.D.C. ——, —— F.2d —— (No. 75-1083, decided Jan. 16, 1976). In *Straus* we noted that "the Commission has evolved a unique and narrow standard to guide its review when a licensee is charged with violating the Fairness Doctrine or its subsidiary rules * * *." —— U.S.App.D.C. at ——, —— F.2d at ——, slip op. at 14. We have frequently warned that this "unique and narrow standard" of the fairness doctrine must be differentiated from the operation of the equal time rule. *See, e.g., Democratic National Committee v. FCC*, 148 U.S.App.D.C. 383, 396-397, 460 F.2d 891, 904-905 (Tamm, J.), *cert. denied*, 409 U.S. 843 (1972); *Green v. FCC*, 144 U.S.App.D.C. 353, 358, 447 F.2d 323, 328 (1971) (Wilkey, J.). *See also Memorandum Opinion and Order*, 25 FCC 2d 283, 291-292 (1970); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598, 599 (1964) ("There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement.").

[2] *See* note 75 *supra*; pp. 43-44 *infra*.

> In view of the fact that the Federal Communications Commission is charged with the responsibility for administering this legislation, the committee acceded to its wishes.

S. Rep. No. 562, *supra*, at 11-12 (emphasis added).[83] *See also* H.R. Rep. No. 802, *supra*, at 13 (committee substituted words "news events" for words "newsworthy events" in introduced bill because the latter language "was unnecessarily vague and might result in a greater weakening of the equal-time requirement than would be desirable."). Thus by adopting a standard which makes "broadcaster discretion • • • the sole criterion of the bona fide nature of a news event," majority op. at 23, the Commission has taken a position in conflict with its own advice, which was accepted by the draftsmen of the 1959 amendment in order to avoid writing vague, open-ended exemptions into the equal time requirement.

Moreover, Congress intended the guidance it strove to provide in the legislative history to be used *by the Commission* as it filled in the details of the statutory scheme:

> [T]he committee has acted very wisely, I think, in not legislating here in complex detail. Instead *there is entrusted to the Federal Communications Commission responsibility for issuing detailed rules and regulations* to implement the legislative intent.

105 CONG. REC. 16227 (remarks of Representative Celler) (emphasis added). *See also id.* at 16234 (remarks of Representative Avery) (committee has shown the House "certain basic guidlines that should direct the rulemaking of the Federal Communications Commission to the end that is sought and was accepted in the industry before the Lar Daly decision."). The committee report and debate in the Senate also emphasized the responsibility of the Commission to establish detailed regulations which would implement the intent of Congress. *See* pages 54-55 *infra*. Indeed, the statute itself specifically recognizes the important role of the Commission in implementing the equal time provision. *See id.*; majority op. at 16-17. The Commission's sweeping delegation of authority to the broadcasters is facially inconsistent with this congressional intention that the Commission would answer all "questions arising under the provisions of this bill and *relating to the details concerning* programs exempt from the operation of section 315(a)." S. Rep. No. 562, *supra*, at 12-13 (emphasis added); *see* page 55 *infra*.

The Commission's action will also frustrate the clearly expressed congressional intention to maintain close oversight of the implementation and impact of the 1959 amendment. Section 2(a) of the 1959 amendment itself, Pub. L. No. 86-274, 73 STAT. 557, declares that Congress intends to reexamine the amendment to Section 315(a) "to ascertain whether such amendment has proved to be effective and practicable." Section 2(b) of the amendment seeks to facilitate this congressional oversight by requiring the Commission to report annually on its administration of the amendment. *See* page 56 *infra*. The promise of vigilant and effective oversight was one of the primary assurances supporters of the

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[83] Rejection of broadcaster discretion as the central criterion of the exemptions was explicitly confirmed on the floor of the Senate by Sen. Pastore:

> Mr. MORTON. * * * Are we not in the bill really relying on the responsibility, fair-mindedness, and integrity of the broadcasting industry? If they do not meet the challenge, we will have to face up to it.
>
> Mr. PASTORE. *We do not meet them in that fashion.* We subject ourselves to their judgment, *insofar as procedures are concerned.* But basically we have left in the law the philosophy of Congress that equal time shall be given to opposing candidates.

105 CONG. REC. 14442 (emphasis added).

1959 amendment offered those who feared any alteration of the equal time requirements."[54]

This congressional concern is easy to understand. As elected politicians the members of Congress have from the beginning been especially sensitive to the political potential of the broadcast media.[55] From their own experiences they know its power."[56] Although *Lar Daly* made clear the need for introducing some flexibility into Section 315, the 86th Congress determined to supervise the uses to which that flexibility would be put.

The Commission's adoption of a standard of broadcaster discretion for defining the scope of Section 315(a)(4) renders effective congressional supervision impossible. As of June 30, 1973 there were 8,676 licensed radio and television stations in the United States. FEDERAL COMMUNICATIONS COMMISSION, 39TH ANNUAL REPORT FISCAL YEAR 1973 at 192. Obviously, Congress cannot meaningfully review the actions of all of these stations. Yet since the Commission itself will be concerned only with objective evidence of broadcaster bad faith, Congress will have to consider the actions of the individual broadcasters if it wishes to determine whether the 1959 amendment, as administered, is "effective and practicable."[57] Thus, by delegating to broadcasters the

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[54] *See, e.g.*, 105 CONG. REC. 14439-14440, 14446, 17829 (remarks of Sen. Pastore); *id.* at 17832 (remarks of Sen. Scott).

[55] *See* 67 CONG. REC. 12501-12505 (1926); 68 CONG. REC. 3034-3035 (1927).

[56] *See, e.g.*, note 22 *supra* (remarks of Sen. Engle).

[57] The question Congress wished to be able to answer was whether the amendment proved to be an "effective and practicable" means of restoring the pre-*Lar Daly balance* between the rights of candidates and the needs of broadcasters. *See* H.R. Rep. 802, *supra* note 7, at 4-5; notes 6-9 *supra* and accompanying text. The majority's statement of the purpose of the legislation, majority op. at 15, 18-19, ignores half of the balance Congress was trying to reestablish.

function Congress assigned to it, the Commission has displaced Congress from the supervisory role it reserved for itself in the 1959 amendment to Section 315.

In the face of this congressional intent—evidenced in the statute itself as well as in the legislative history—for the Commission to retain control of implementation of the 1959 amendment, the Commission and the majority point to two aspects of the legislative history to support delegation of authority to broadcasters. The point most relied on is the refusal of the conference committee to accept a provision of the House bill which restricted the exemptions to candidate appearances "incidental to" presentation of other news. *See* 55 FCC 2d at 703-705 & n.9, 35 P & F RADIO REG.2D at 56-59 & n.9, J.A. 150-153 & n.9; majority op. at 22-23.

I cannot agree that this action requires, or even authorizes, the Commission to adopt a standard of deference to good faith broadcaster judgment. Since the Senate bill contained no "incidental to" restriction, the conference committee's action is best interpreted as merely adopting the Senate's view of the appropriateness of such a test. As I have shown above, the Senate, which was greatly concerned with maintaining effective congressional oversight, intended the Commission to involve itself with the details of the exemptions and specifically rejected use of a test relying on broadcaster judgment.[58] Moreover, Representative Bennett, the leader of the opposition to the "incidental to" test, explained that he feared the test would be confusing and impractical. *See* 105 CONG. REC. at 16241-16242; *id.* at 17778. He did not indicate that the problem with the test was that it unduly restricted the broadcasters, nor did he suggest that deleting the "incidental to" language would be desirable because it would make broadcaster judg-

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[58] *See* notes 82-83 *supra* and accompanying text.

ment decisive. Any such suggestion would have been startling since during the committee hearings Representative Bennett had repeatedly expressed his belief that the broader proposals being considered would place too much discretion in the hands of the broadcasters. *See* House Hearings, *supra*, at 80-82, 142-143, 189-193.[89]

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[89] Mr. BENNETT. Now, dealing with the other part, the new cast part, if I read correctly, the language which you suggest * * * in effect would give the station or network almost complete and unlimited control over this type of broadcast on the part of political candidates. To me the language "newscasts, news interviews, news documentaries, panel discussions, debate, and special events programs," is so broad that I do not know what other category you could pick out that a candidate could possibly participate in which would not come under one of these terms you have in that section. Do you?

The broadcaster would be free to do as he pleases except that he would have to make an objective presentation of whatever he did present, whatever that means.

* * * *

I do not believe that what you suggest here is the right way to deal with it. *I do not think unlimited arbitrary control of what is or is not to be shown under the guise of a newscaster's debate ought to be left in the hand of the television or radio industry.* I think you would be creating more problems than you would be solving.

* * * *

* * * If I were spokesman for your industry I would probably feel as you do. Certainly, what you have said is true, namely, that this would give complete authority to the industry to determine what will go on and no one will have any remedy. When you speak of only a few isolated cases or abuses of it, that could be true, but if it is possible to do it, and it would be under this kind of language, the substitution might be very real and very damaging to the particular individual concerned.

[continued]

The Commission also relies on the legislative history's references to the increased role for broadcaster discretion created by the 1959 amendment. These references, however, simply indicate congressional recognition that *if* a program is within one of the exempt categories, the broadcaster's discretion will govern its use or nonuse of that program. There is no indication that broadcaster judgment is to be the determinant of *whether* a program or type of program falls within one of the exempt categories. Rather, it is for the Commission—as it did wrongly, I submit, in this case—to indicate the types of broadcasts included in each statutory exemption so the broadcasters may then exercise their discretion in handling programs of those types.[90]

For my part, I would rather see nothing in the act than this complete and specific unlimited authority which would be given to the industry.

House Hearings 80-82 (emphasis added). *See also* note 61 *supra*.

[90] The Senate report's statement that "[t]he proposal affords the licensee freedom to exercise his judgment in the handling *of this type program* * * *," S. Rep. No. 562, *supra* note 7, at 14 (emphasis added), *quoted*, CBS br. at 17, is consistent with this analysis. Discretion "in the handling of this type program" is a far cry from granting the broadcaster virtually unreviewable discretion to determine whether a program is of the required "type." *See also* note 83 *supra* (remarks of Sen. Pastore) (broadcaster judgment governs procedures only); text accompanying notes 103-104 *infra*. Rep. Harris' statement, heavily relied on by the Commission and its proponents, *see, e.g.*, 55 FCC 2d at 704 n.9, 35 P & F RADIO REG.2D at 57-58 n.9, JA 151 n.9; majority op. at 22-23; FCC br. at 26 n.13; NBC br. at 16, 34, that the bill leaves "reasonable latitude" for exercise of good faith broadcaster judgment, 105 CONG. REC. 17782, similarly suggests a confined role for broadcaster discretion.

In *Thomas R. Fadell*, 40 FCC 380, 25 P & F RADIO REG. 288, *aff'd mem.*, 25 P & F RADIO REG. 2063 (7th Cir. 1963), the

Thus nothing in the legislative history supports the standard the Commission has adopted. To the contrary, the legislative history indicates that Congress rejected incorporating broadcaster judgment in the definition of the exemptions. Rather, Congress intended the Commission to retain control over implementation of the 1959 amendment and to concern itself with "the details concerning programs exempt from the operation of section 315(a)."[91] The reason for this congressional decision to locate decision-making authority in the Commission rather than among the 8,676 broadcasters is also clear: Congress wished to assure its own ability to supervise administration of the amendment. Since *Aspen*'s standard undermines that ability by redelegating the responsibility imposed on the Commission, we can uphold the law written by Congress only by rejecting the opinion written by the Commission.

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only equal time case cited by the majority in support of the Commission's new approach, majority op. at 22, the Commission utilized the two-step analysis described in text. There the Commission first reached its own determination that the program broadcast involved a "news event" within the meaning of § 315(a)(4). It then went on to consider whether there was any indication that the broadcaster's decision to broadcast or its treatment of the program was affected by partisan motives. Finding no such evidence, the Commission concluded "that in the circumstances of this case, the program falls within the 'reasonable latitude for the exercise of good faith news judgment on the part of the [licensee]' * * * and is exempt from the equal time requirement of Section 315." 40 FCC at 382. The Commission now maintains that the conclusion in *Fadell* should be the starting point for analysis under § 315(a)(4) and that absence of any evidence of the broadcaster's intent to advance a candidate's cause eliminates the need for any further inquiry.

[91] *See* text accompanying notes 82-84 *supra*.

II. The Commission Failed to Comply With the Administrative Procedure Act

This controversy was initiated when the Aspen Institute Program on Communications and Society (Aspen) and Columbia Broadcasting System, Inc. (CBS) petitioned the FCC to issue declaratory rulings reversing prior Commission decisions under Section 315. Aspen's petition, filed April 22, 1975, asked the Commission to overrule two prior decisions[92] and hold that joint appearances of political candidates may be covered as "bona fide news events."[93] The CBS petition was filed July 16, 1975. That petition, which also asked the Commission to overrule an earlier decision,[94] sought a declaration that presidential press conferences could be broadcast live as "on-the-spot coverage of bona fide news events."[95]

The Commission never published formal notice of the existence of either petition. Nevertheless, petitioners here became aware[96] of the Aspen and CBS requests

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[92] *See* note 11 *supra*.

[93] *See* Petition for Revision of First Report/Fairness Report in Docket No. 19260 or for Issuance of Policy Statement or Declaratory Ruling, JA 1-21.

[94] *See* note 11 *supra*.

[95] *See* CBS Petition for Declaratory Ruling, JA 22-44. CBS also sought to have the Commission rule that a press conference is a "bona fide news interview" under § 315(a)(2). *See* notes 71, 76 *supra*.

[96] The Commission states that filing of the Aspen petition was announced in a press release, referred to the same day by the Commission's chairman in a prepared statement for the Senate communications subcommittee, and noted in *Broadcasting* magazine. FCC br. at 7 n.1. Petitioner Democratic National Committee learned of the filing of the CBS petition from reports in the press. DNC br. at 11.

and filed comments with the Commission. These comments both opposed the substance of the proposed restructuring of Section 315 doctrine and urged the Commission to proceed by rule making if it wished to make such major prospective changes in existing law.[97] Other interested groups also filed short statements requesting that the Commission act by rule making to provide opportunity for public participation and to assure that such important matters of public concern would not be decided without full consideration of the many substantial questions involved.[98] Despite these requests, the Commission did not initiate a rule-making proceeding. Instead it adopted the opinion challenged in this action on September 25, 1975. In that opinion the Commission noted that although Aspen and CBS had requested declaratory rulings and were therefore the only parties formally before the Commission, the objections of petitioners here had been "fully considered." 55 FCC 2d at 703 n.8, 35 P & F RADIO REG.2D at 56 n.8, JA 149 n.8.

I agree with petitioners that this truncated form of proceeding, involving no formal notice and opportunity to comment,[99] is inadequate in these circumstances, and that the Commission should have followed the informal rule-making procedures of Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970). But

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[97] *See* JA 45, 70, 127.

[98] *See* JA 121 (Congressional Black Caucus), 123 (Citizens for Reagan for President), 125 (Hon. Jimmy Carter), 126 (League of Women Voters).

[99] It is interesting to compare the procedures followed by the FCC here with the lengthy public procedures approved in this court's *en banc* opinion in *Ethyl Corp. v. EPA*, —— U.S.App.D.C. ——, —— F.2d —— (No. 73-2205, decided March 19, 1976). The four dissenting judges in *Ethyl* would require the agency to follow even more stringent procedures. *See* —— U.S.App.D.C. at ——, —— F.2d ——, Wilkey dissent at 17-50.

even if the Commission could properly institute these changes by adjudication, as it claims to have done, its decision is still required to comply with "the 'simple but fundamental rule of administrative law,' * * * that the agency must set forth clearly the grounds on which it acted." *Atchison, Topeka & S.F. R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973), *quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). For it is only on those grounds that the Commission's action can be judicially reviewed. *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943). The Commission has not satisfied this most basic requirement of administrative law.

A. *The Need for Informal Rule-Making Procedures*

1. *The Choice Between Adjudication and Rule Making.* —The Commission maintains that its opinion is a declaratory order, an adjudication under Section 5 of the APA, 5 U.S.C. § 554(e) (1970), and that it is authorized to issue such an order by that statute and by Section 1.2 of its regulations, 47 C.F.R. § 1.2 (1975). Although I believe the Commission's authority to issue a declaratory order in these circumstances is questionable at best,[100] I will assume here that the Commission has

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[100] As recently as 1970 the Commission stated:

> * * * The grant of authority to agencies to issue declaratory orders is limited, and such orders are authorized only with respect to matters which are required by statute to be determined "on the record after opportunity for an agency hearing." * * * In general, the Commission limits its interpretive rulings or advisory opinions to situations where the critical facts are explicity [*sic*] stated without the possibility that subsequent events will alter them. It prefers to issue such rulings or opinions where the specific facts of a particular case in controversy are before it for decision. In response to general inquiries, the Commission limits itself to giving general

properly characterized its action. The remaining question is whether the Commission had authority to proceed by adjudication rather than by rule making in this case. I conclude that the Commission did not have that authority.

The Commission and the majority, relying primarily on the recent Supreme Court decision in *NLRB v. Bell Aerospace Co., supra*, conclude that the Commission's choice may be supported by reference to the generally broad discretion allowed administrative agencies in deciding whether to act by adjudication or rule making. 55 FCC 2d at 712 n.20, 35 P & F RADIO REG.2D at 67 n.20, J.A. 161 n.20; majority op. at 33-34. But in *Bell Aerospace* the Court held merely that in deciding whether the buyers who worked for a particular employer were managerial employees the NLRB was free to proceed by adjudication.[101] The Court expressly reserved the question whether the Board would have to use rule making to adopt a new general standard for determining when an employee is a managerial employee. 416 U.S. at 291-292; Chisholm br. at 7-8. In the context of this case *Bell Aerospace* leaves open the question whether the Commission "should have resorted to rulemaking, or in fact improperly promulgated a 'rule,'" 416 U.S. at 291, when it held that all candidate debates and press conferences are exempt under Section 315(a)

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guidelines to help an individual or station determine their rights and obligations under section 315. * * *

Use of Broadcast Facilities by Candidates for Public Office [Public Notice of August 7, 1970], 35 FED. REG. 13048, 13067 (1970). Here the Commission had no "particular case in controversy * * * before it for decision," and it had no "specific facts" on which to base its ruling. *See* note 107 *infra*.

[101] The majority recognizes the limited nature of the *Bell Aerospace* holding, *see* majority op. at 33, but it fails to compare the narrowness of that holding with the breadth of the Commission's decision in this case.

(4) from the equal time requirement and that henceforth good faith broadcaster judgment would determine the extent of Section 315(a)(4). Moreover, the *Bell Aerospace* Court noted that even when considering a narrow question such as the status of particular employees "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act * * *." *Id.* at 294. For the reasons explained below, I conclude that even if this case involved only a narrow ruling by the Commission[102] it is one of those exceptional "situations" where rule making is required. These same reasons compel the conclusion that the question reserved in *Bell Aerospace* should be answered affirmatively here.

Two parts of the equal time statute require this case to be treated as an exception to the general rule of administrative discretion. First, the Communications Act commands that "[t]he Commission *shall prescribe* appropriate rules and regulations to carry out the provisions of this [equal time] section." 47 U.S.C. § 315(d) (Supp. IV 1974) (emphasis added). A similar provision has been in the law since the equal time requirement was first enacted in the Radio Act of 1927. Act of Feb. 23, 1927, ch. 169, § 18, 44 STAT. 1170. Its originator explained that the purpose of the rule-making provision was to allow the Commission to fill in the details necessarily omitted from the legislative language. 67 CONG. REC. 12503 (1926) (remarks of Senator Dill). This purpose was reaffirmed in 1959:

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[102] Even if the Commission's decision is viewed as limited to nonstudio debates and press conferences broadcast live and in their entirety, *but see* notes 24, 31, 50, 57, 60, 68 *supra*, 107 *infra*, exempting *all* such programs is a significantly broader ruling than is a decision that buyers employed by a particular firm are or are not managerial employees.

> The committee wants to make it clear that • • • the committee fully intends for the Commission to exercise the rulemaking authority in section 315 ([d]) on questions arising under the provisions of this bill and relating to the details concerning programs exempt from the operation of section 315(a).

S. Rep. No. 562, *supra*, at 12-13.[103] Accordingly, Senator Pastore told his colleagues:

> What is a newscast? We are saying to the Commission, "Tell us what it is, and make rules and regulations, so that all may know."
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> What is a news documentary? We say to the Commission, "Define it by rules and regulations."
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> • • • •
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> The Commission is *obliged* under the bill *to promulgate rules and regulations* which will define a newscast, a news documentary, and on-the-spot news coverage.
>
> • • • •
>
> • • • [T]he Commission is *duty bound* under this amendment by *rule and regulation* to tell us exactly what is meant by a newscast, a news documentary, and on-the-spot news coverage.

105 Cong. Rec. 14455-14456 (emphasis added).

If the only purpose of this emphasis on rule making were assuring that all interested parties receive notice of the Commission's understanding of the exemptions, the procedure the Commission followed in this case would suffice. However, Congress intended the Commission to write rules as an exercise of its expert judgment, based on the specialized knowledge of broadcasting it possesses and on additional information it could obtain from the

[103] Following issuance of rules defining exempt types of programs, the Commission could decide controversies relating to particular broadcasts by interpreting and applying its rules. *See* S. Rep. No. 562, *supra* note 7, at 13.

public through rule making.[104] S. Rep. No. 562, *supra*, at 12. The Commission's action here does not fulfill this congressional expectation.[105]

The second part of the statute that distinguishes this case from situations governed by the general rule recognized in *Bell Aerospace* is Section 2 of the 1959 amendment. To facilitate the oversight promised in Section 2(a), *see* page 44 *supra*, Section 2(b) requires that

> the Federal Communications Commission shall include in each annual report it makes to Congress a statement setting forth (1) *the information and data used by it in determining questions arising from or connected with such amendment*, and (2) such recommendations as it deems necessary in the public interest.

(Emphasis added.) Thus Congress assumed that the Commission would follow information-generating procedures when ruling on at least the most important questions to arise under Section 315(a). Only by so doing would the Commission provide Congress with the basis for exercising informed oversight.

The Commission's primary response to the suggestion that it should have conducted a rule-making proceeding to gain information relevant to its decision is that

[104] The Commission's discretion is, of course, limited by the guidelines established in the legislative history. *See* Parts I-A, I-B *supra*.

[105] If the Commission were just correcting a legal error in its prior interpretations of the legislative history, as it claims to be doing, there would be no need for it to gather information on which to base an expert decision. In fact, however, the Commission has made a basic policy decision which, on the view most favorable to its position, is not at all compelled by the legislative history. *See* note 106 & Part II-B *infra*. *See also* ABC br. at 9-12, 18.

> it would have been useless for the Commission to seek comments on whether, for policy reasons, it should or should not apply correctly the rules of statutory construction to the cases which it overruled. Clearly, the Commission has a duty to correct its mistakes in legal interpretation.

FCC br. at 48 n.26; *see id.* at 46 n.22a, 49, 52. As I demonstrate below, *see* Part II-B *infra*, and as the majority tacitly recognizes,[1] this characterization misrepresents what the Commission actually did. In addition, the Commission suggests that since it confined its action to overruling prior cases it was acting on "a pre-existing record which stipulated critical facts * * *." FCC br. at 19 n.28. Again, this statement misrepresents the Commission's action since *Aspen* not only ruled on the eligibility of candidates' debates and press conferences for exemption under Section 315(a)(4) *but also established a new standard for determining the extent of that section.* Moreover, even if the Commission had not promulgated a new standard its holding would not have been limited to the "critical facts" [107] of its earlier cases.

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[1] The majority's heavy reliance on the discretion granted the Commission, *see* majority op. at 4, 15-18, 23, 31-32, 37, indicates its awareness that the Commission's decision is not simply the product of a correct application of the rules of statutory construction.

[107] Presumably the "critical facts" to which the Commission refers are mirrored in the requirements that debates be non-studio debates, *i.e.*, that they not be sponsored by the broadcaster, and that coverage of both debates and press conferences be live and in full. However, the overruled decisions do not appear to have involved these "critical facts." In 1963, a mere eight months after issuing its ruling in the *Wyckoff* case, *see* note 11 *supra*, the Commission informed Congress that "[u]pon inquiry, it appeared that the debate had been [pre-]empted by the stations * * *." Hearings on S. 251 Before the Subcommittee on Communications of the Senate Committee on Commerce, 88th Cong., 1st Sess., 85 (Report of Federal Communications Commission Concerning Complaints Received During the 1962 Elections and Similar Complaints Received to June 1, 1963). The ruling in *Columbia Broadcasting System, Inc., supra* note 11, dealt with broadcast of presidential candidates' press conferences "in whole *or in substantial part* on a live *or slightly delayed* basis * * *." 40 FCC at 396, 3 P & F RADIO REG.2D at 624 (emphasis added).

The 1964 decision on press conferences, *Columbia Broadcasting System, Inc., supra*, 40 FCC 395, 3 P & F RADIO REG.2D 623, considered only the press conferences of incumbent Presidents and candidates for the presidency. *Aspen* covers candidates for all offices, national and local.

This is not an insignificant extension. The impact of the Commission's action on coverage of thousands of candidates in local races, where the broadcasters' actions may be less controlled by fear of adverse public reaction to favoritism, is an important consideration when evaluating the wisdom of the Commission's new policy. Similarly, the Commission could usefully have sought to educate itself about the effect of establishing broadcaster judgment as the governing criterion for the Section 315(a)(4) exemption on the ability of political minorities to participate effectively in the political process.[108] Finally, even if consideration of all the relevant information led the Commission to conclude that it ought to adopt a policy of deference to broadcaster judgment, the information obtained in a rule-making proceeding would allow formulation of appropriate guidelines for exercise of that discretion.[109] Although in the absence of notice

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[108] *See* UCC br. at 18-25; Chisholm reply br. at 19-21. Information about the impact of its rulings on the political process is what Congress had in mind when it required the Commission to include in its reports information sufficient to allow a congressional determination whether the 1959 amendment is "effective and practicable." *See* note 87 *supra* and accompanying text.

[109] For example, the Commission's legislative proposals, *see* note 2 *supra* and accompanying text, retain the equal oppor-

no local political parties or groups submitted any comments to the Commission, we cannot assume that no such group has anything valuable to contribute.'[10]

I therefore conclude that there are many areas of inquiry where more information would have aided the Commission's decision making. This conclusion, combined with the congressional emphasis on rule making, the relationship between rule making and congressional oversight, and the fact that the Commission has reversed its prior long-standing precedents in a most important and sensitive area of its statutory responsibility, leads me to believe that even if the rule of *Bell Aerospace* is applicable here the Commission should have acted by promulgating a rule. Moreover, the general nature of the Commission's holdings—that broadcaster good faith determines the scope of Section 315(a)(4) and that all nonstudio debates and press conferences held by candidates fall within that section—convinces me that this case raises the question explicitly left undecided in *Bell Aerospace*. I have no doubt that the proper answer to that question, in these circumstances, is to require the Commission to utilize the rule-making procedures designed "for formulating, amending, or repealing * * * an agency statement of general * * *

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tunities principle but require that candidates have "significant public support" to be eligible to claim equal time. *See* FCC, 39TH ANNUAL REPORT, *supra* note 2, at 39. A similar approach to press conferences and debates, assuming *arguendo* that the Commission has any authority to treat such broadcasts as exempt, would at least lessen the possible harmful impact of the Commission's ruling.

[10] The majority notes that the Commission "had the benefit of all arguments raised before this court." Majority op. at 31. While the statement is correct, the important point is that neither the Commission nor this court has had the benefit of a local perspective.

applicability and future effect * * *." 5 U.S.C. §§ 551(5), 551(6) (1970).

2. *The Need for Rule-Making Procedures.*—The Commission also maintains that its summary action in this case can be properly characterized as a rule making rather than an adjudication, but notice and comment procedures were not required because the rule is interpretative. FCC br. at 50-52; *see* 5 U.S.C. § 553(b) (1970). To a large extent this contention is based on the Commission's belief, discussed above, that rule-making proceedings involving notice and comment would be of no use. The Commission also argues that since it is merely interpreting Section 315(a)(4) the result is an interpretative rule.

The distinction between an interpretative rule, exempt from the notice and comment requirements of Section 4 of the APA, and a legislative rule, to which those requirements apply, is often tenuous. *See, e.g., National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 696 (2d Cir.), *cert. denied*, —— U.S. ——, 44 U.S. L. WEEK 4201 (October 6, 1975). No talismanic factor has emerged from the cases or the commentary as a guide for puzzled courts, and the last section of a lengthy dissent is no place to assay a definitive resolution of the riddle. Therefore, without attempting to establish a general formula for detecting legislative rules although they are labeled interpretative, I will simply identify three aspects of this proceeding which support the conclusion that the Commission's new approach to Section 315(a)(4) is not merely an interpretation.

First, and according to Professor Davis most importantly, 1 K. DAVIS, ADMINISTRARIVE LAW TREATISE § 5.03 at 302 (1958), the Commission has been issued a specific grant of legislative rule-making power in this area. Moreover, Section 315(d) of the Communications Act, as well as the legislative expressions of intent dis-

cussed in Part II-B-1 *supra*, make clear that this specific grant is also a broad grant.[11] The Commission was directed to use that legislative rule-making authority, among other purposes, "to define a newscast, a news documentary, and on-the-spot news coverage" 105 CONG. REC. 14456 (remarks of Senator Pastore).

A related consideration in determining whether a rule is legislative or interpretative is the impact of the rule in later actions. If a rule is interpretative it does not foreclose challenge in a plenary proceeding before the agency itself, *see National Ass'n of Insurance Agents, Inc. v. Board of Governors*, 169 U.S.App.D.C. 144, 146-147, 489 F.2d 1268, 1270-1271 (1974), or in court, *see, e.g., Pacific Gas & Electric Co. v. FPC*, 164 U.S.App.D.C. 371, 375 n.14, 506 F.2d 33, 37 n.14 (1974) (dictum); *American President Lines, Ltd. v. FMC*, 114 U.S.App. D.C. 418, 421, 316 F.2d 419, 422 (1963); 1 K. DAVIS, *supra*, at § 5.04. In this case, however, there is no indication that the Commission considers its conclusion anything but final, or that it will be willing in the future to entertain Section 315 complaints regarding debates or press conferences in the absence of evidence of broadcaster bad faith. *Contrast National Ass'n of Insurance Agents, Inc. v. Board of Governors, supra.* Since the Commission is the important enforcement forum given the delay inherent in judicial review, the Commission's attitude alone requires that this rule be deemed legislative. Moreover, as the majority's willingness to defer even when the Commission claims not to have exercised either discretion or special expertise indicates, judicial review of the Commission's handling of Section 315 complaints is likely to be substantially less than plenary.

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[11] The Commission's discretion must be exercised within the bounds established by Congress. *See* Parts I-A, I-B *supra*.

Finally, courts should consider the impact of a rule in the instant case before classifying it as interpretative. *American Bancorporation, Inc. v. Board of Governors*, 509 F.2d 29, 33 (8th Cir. 1974); *Hou Ching Chow v. Attorney General*, 362 F.Supp. 1288, 1292 (D. D.C. 1973); *Pharmaceutical Manufacturers Ass'n v. Finch*, 307 F.Supp. 858, 863 (D. Del. 1970); *National Motor Freight Traffic Ass'n v. United States*, 268 F.Supp. 90, 95-96 (D. D.C. 1967) (three-judge court) (McGowan, J.), *affirmed*, 393 U.S. 18 (1968); *see Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972). There can be no question that this rule, which substantially alters the rights of all candidates for political office anywhere in the country, has a widespread and significant impact. This impact is, of course, heightened by the practical importance of the Commission in the enforcement process. Even if judicial review of Section 315 rulings were plenary and rapid, the practical difference between having the Commission defend in court its ruling in behalf of a candidate seeking equal time and requiring that candidate to go to court against the Commission is obviously substantial.

These factors can all be incorporated into an analysis which looks to the purpose of the APA. If a rule has a substantial impact on its own, and especially if that rule relies on a source of administrative authority that assures limited judicial review, it should not be exempted from the notice and comment provisions of Section 4. "[T]hat very quality of importance—to the industry and to the public—is what lies at the base of Section 4 of the APA and which informs the Congressional purpose in that law to expose proposed agency action by general rule to the test of prior examination and comment by the affected parties." *National Motor Freight Traffic Ass'n v. United States, supra*, 268 F.Supp. at 96. *Accord, Pharmaceutical Manufacturers Ass'n v. Finch, supra*, 307 F.Supp. at 863.

The Commission's ruling placing discretion in this important political area in the hands of broadcasters is too important to the American people for it to have been made by the commissioners alone and uninformed of the public interest in the various parts of this country.

B. *The Inadequacy of the Commission's Explanation*

Aspen's rationale is that the Commission in its previous decisions had "relied on a mistaken interpretation of law," that it had misread the intent of Congress, by finding candidates' debates and press conferences not "incidental to" presentation of news and therefore outside the scope of Section 315(a)(4).[112] I have explained

[112] 55 FCC 2d at 712 n.20, 35 P & F RADIO REG.2D at 67 n.20, JA 21-22 n.20; *see* 55 FCC 2d at 704-705, 706 n.12, 35 P & F RADIO REG.2D at 56-60, 61 n.12, JA 151-153, 154 n.12. The Commission's claim that its earlier decisions rested on the "incidental to" test, *see* text accompanying notes 87-89 *supra*, is questionable. In *Wyckoff*, *supra* note 11, the Commission's opinion does not mention the "incidental to" test. The entire opinion deals with the broadcasters' contention that their judgment is the sole criterion for determining whether an event is a "bona fide news event." The Commission's summary of its decision makes this focus clear:

> In setting forth the above, the Commission does not, of course, question the *bona fides* of your news judgment or the manner in which it has been exercised by you. Rather, we make clear that this is not the sole criterion to be used in determining whether Section 315(a)(4) has been properly invoked.

40 FCC at 373, 24 P & F RADIO REG. at 404. In *Columbia Broadcasting System, Inc.*, *supra* note 11, the Commission again did not mention the "incidental to" test. It did, however, quote extensively from its previous discussion explaining why good faith broadcaster judgment could not be the sole determinant of inclusion within § 315(a)(4). *See* 40 FCC at 397-398, 3 P & F RADIO REG.2D at 627-628. The Commission otherwise explained its decision to Congress by adverting only to this [illegible]

[continued]

in Part I *supra* my reasons for concluding that the Commission, on this second time around, has dramatically misread the intent of Congress. At this stage of the argument the more important point is that my colleagues in the majority are also unable to find the "compellingly clear" legislative history on the basis of which the Commission has reversed its long-standing precedents. Thus the majority opinion states only that the legislative history of the 1959 amendment provides "inconclusive" support for the Commission's interpretation. Majority op. at 15, 18.[113] On the crucial question of "[w]hether broadcaster discretion was intended to be the sole criterion of the bona fide nature of a news event, absent a violation of the fairness obligation," the majority is "unable to reach a definite conclusion from the legislative history." *Id.* at 23.

The majority attempts to bridge this gap between what it can find in the legislative history and the basis on which the Commission claims to have acted by referring to the deference due an administrative agency's discretion in construing its governing statute. *Id.* at 18, 32; *see, e.g.*,

> [The Commission] held further that [such press conferences] did not fall within the "on-the-spot coverage of bona fide news events." *This part of the ruling was based on* prior Commission findings that "if the sole test of the on-the-spot coverage exemption is simply whether or not the station's decision to cover the event and to put it on a broadcast program constitutes a bona fide news judgment, there could be no meaning to the other three exemptions in section 315(a) since these, too, all involve a bona fide news judgment by the broadcaster. * * *

FCC, 31ST ANNUAL REPORT, *supra* note 49, at 86 (emphasis added).

[113] The majority maintains that this "inconclusive" support is nevertheless "substantial." Majority op. at 18. Interestingly, the majority does not attempt to identify this "substantial" support.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (dictum). I question whether deference to the administrative statutory interpretation is appropriately granted to the Commission's reversal of its long-standing construction of Section 315(a)(4), particularly where the court itself finds the legislative history inconclusive.[114] But even if deference is warranted, the Commission here did not choose one of many permissible constructions as an exercise of its discretion.[115] Instead it claimed to be under the compulsion of a clear legislative mandate.

This case, then, falls squarely within the holding of *Chenery I*, *supra*. There the Securities and Exchange Commission claimed to have acted under the direction of legal precedent. The Court concluded that the cited precedent did not govern the SEC's action and, although it

[114] The Commission's decision to reverse its long-standing holdings, accepted by both Congress and the industry (the decisions now overruled were never appealed), "was no sooner made than challenged." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944). This is not a case where the challenged administrative ruling "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), *quoted in, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965). Here, over the dissent of the only member who was serving when the exemptions were created, *see* note 13 *supra*, the Commission has overturned the nearly "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion • • •" The Commission has based its action on its reading of a 17-year old legislative history. In these circumstances our expertise is at least as great as the Commission's.

[115] The Commission relies on its discretion only to support its contention that it need not proceed by rule making. *See* 55 FCC 2d at 712 n.20, 35 P & F RADIO REG. 2d at 67 n.20, JA 161 n.20.

recognized that the SEC might have been able to take the same action as an exercise of its discretion, refused to affirm on grounds other than the basis on which the SEC had acted. Here the majority agrees with me that the binding legislative history which the Commission gives as the reason for its action does not exist. Therefore, assuming *arguendo* that the new approach to Section 315(a)(4) is within the Commission's delegated authority, we should refuse to affirm the Commission's holding as an exercise of discretion in the absence of an administrative opinion that recognizes and explains the basis of its choice.

III. CONCLUSION

The Commission's ruling exempting debates and press conferences is contrary to the intent of Congress in passing the 1959 amendment. Most importantly, as the Commission itself held in the cases it is now reversing,[116] affirming the Commission's action in this case effectively repeals Congress' venerable equal time legislation. The Commission concedes that under its ruling broadcasters may now pick and choose as to which candidates' press conferences and which candidates' debates they will put on the air without restraint from the equal time law. The Commission argues, however, that its ruling is limited to debates and press conferences. But its ruling was so limited only because it was a response to similarly limited petitions. There is simply no principled way to hold that debates and press conferences are covered by the 1959 exemption to the equal time law if considered newsworthy by the broadcaster in the exercise of its good faith judgment without also holding that other partisan political efforts made by a candidate for office, including speeches, are also covered. As the Commission said, first time around:

[116] See text accompanying notes 80-81 *supra*.

> • • • [I]f we were to construe subsection (a)(4) as encompassing all coverage of a candidate deemed newsworthy by the licensee, it would mean that the equal opportunities requirement of Section 315, in effect, had been repealed—that the licensee, in the exercise of his good faith news judgment, could cover the speeches, press conferences, indeed any and all appearances of a candidate, without bringing into play the equal opportunities requirement. But Congress clearly intended, with four exceptions, to retain that requirement—to, as Chairman Harris stated, "limit carefully the exceptions from Section 315"—(105 Cong. Rec. 17778). • • •

Columbia Broadcasting System, Inc., supra, 40 FCC at 398, 3 P & F RADIO REG.2D at 627-628.

Proper deference to the Commission's expertise cannot insulate this exercise in administrative arrogation of power from judicial review. The Commission has not relied on its discretion, nor has it complied with the procedures designed by Congress to assure that discretion is wisely used. Instead the Commission has based its reversal of settled law on a highly selective reading of the legislative history, the same legislative history it used to establish the settled law. Surely in these circumstances we should heed the Supreme Court's warning that "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965).

I respectfully dissent.

APPENDIX 3
ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1951 — September Term, 1975

The Honorable Shirley Chisholm, et al.,
Petitioners

v.

Federal Communications Commission and
United States of America,
Respondents

CBS, Inc.,
American Broadcasting Companies, Inc.
National Broadcasting Co., Inc.
Radio Television News Directors Asso.
The Office of Communication of the United
Church of Christ, et al.
International Union, United Automobile,
Aerospace & Agricultural Implement Workers
of America,
Intervenors

(Filed May 13, 1976)

No. 75-1994

Democratic National Committee,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents

American Broadcasting Co., Inc.
Radio Television News Directors Asso.
Intervenors

Before: Wright, Tamm and Wilkey, Circuit Judges.

ORDER

On consideration of the petition for rehearing filed by petitioners Shirley Chisholm and National Organization for Women in No. 75-1951, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX 4

RELEVANT PROVISIONS OF SECTION 315(a) OF THE COMMUNICATIONS ACT OF 1934

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

SEC. 315.

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection [61] upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act [61a] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. ***

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[61] The words "under this subsection" were added by Public Law 92-225, approved February 7, 1972, 86 Stat. 3. Earlier, the Statutes at Large (66 Stat. 717) showed the word "hereby" before "imposed" but the United States Code (47 U.S.C. 315) did not.

Nos. 76-101 and 76-205

In the Supreme Court of the United States

OCTOBER TERM, 1976

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.

THE HONORABLE SHIRLEY CHISHOLM, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-126a)[1] is not yet reported. The opinion of the Federal

[1] "Pet. App." refers to the appendices in No. 76-101.

Communications Commission (Pet. App. 1a-22a) is reported at 55 F.C.C. 2d 697.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1976. A timely petition for rehearing by the petitioners in No. 76-205 was denied on May 13, 1976 (Pet. App. 127a-128a). The petition for a writ of certiorari in No. 76-101 was filed on July 23, 1976, and the petition in No. 76-205 was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 315(a)(4) of the Communications Act of 1934 exempts "on the spot coverage of bona fide news events" from the requirement of Section 315(a) that a broadcaster affording air time to a political candidate must make equal time available to all competing candidates. The Federal Communications Commission has held that press conferences of political candidates and debates between political candidates (not arranged by the broadcaster) may be "bona fide news events," and that live and complete coverage of them may be exempt from the equal time requirement. The questions presented are:

1. Whether the Commission properly interpreted the statute (both petitions).

2. Whether the Commission should have used a formal rulemaking proceeding rather than an adjudicatory proceeding as the forum in which to interpret the statute (No. 76-205 only).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. (and Supp. V) 315(a), are set forth at Pet. App. 129a.

Section 315(d) of the Communications Act of 1934, as added, 66 Stat. 717, and redesignated, 47 U.S.C. (Supp. V) 315(d), provides:

> The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

STATEMENT

1. As originally enacted, Section 315 of the Communications Act of 1934, 48 Stat. 1088, provided that:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station * * *.

For 25 years the Federal Communications Commission did not apply this "equal time" provision to the appearance of a candidate on a newscast.[2] In 1959, however, the Commission reversed its prior interpretation and held that licensees must afford equal exposure to all qualified candidates whenever any candidate appears on a regularly scheduled newscast. *Columbia Broadcasting System, Inc.* (*Lar Daly*), 18 P & F Radio Reg. 238, reconsideration denied, 26 F.C.C. 715.

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[2] See, *e.g.*, *Allen H. Blondy*, 40 F.C.C. 284.

Many people feared that the *Lar Daly* rule "would tend to dry up meaningful radio and television coverage of political campaigns." S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959). Congress promptly overruled the Commission's decision by amending Section 315 to exclude four categories of news programs from the equal time rule. These categories are (Section 315(a)):

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

In *The Goodwill Station, Inc.*, 40 F.C.C. 362, and *National Broadcasting Co.*, 40 F.C.C. 370, the Commission held that coverage of debates between political candidates was not "on-the-spot coverage of bona fide news events" within the meaning of the exemption. In reaching this conclusion the Commission relied in large part upon portions of the legislative history of the amendment (see, *e.g.*, H.R. Rep. No. 802, 86th Cong., 1st Sess. (1959)) which tended to indicate that the exemption was limited to situations where the appearance of a candidate was "incidental to" some independent news event, and was not available where the appearance of the candidate constituted the only newsworthy element of the event.

Two years later the Commission relied upon these decisions to hold that a press conference of the President or a presidential candidate was not a "bona fide news event," and that a station broadcasting such a news conference therefore would be required to make equal time available to other candidates. *Columbia Broadcasting System, Inc.*, 40 F.C.C. 395.[3]

2. On April 22, 1975, the Aspen Institute Program on Communications and Society ("Aspen") petitioned the Commission to overrule *The Goodwill Station* and *National Broadcasting Co.* Aspen argued that those decisions were founded upon a misreading of the legislative history of the 1959 amendment to Section 315. On July 16, 1975, CBS, Inc., petitioned the Commission to overrule *Columbus Broadcasting System.*[4] Petitioners in this Court filed written comments with the Commission opposing the Aspen and CBS petitions.

3. The Commission overruled *Goodwill Station, National Broadcasting Co.* and portions of *Columbia*

[3] The Commission also held that a press conference would not be exempt as a "bona fide news interview" within the meaning of Section 315(a)(2).

[4] By news release of April 28, 1975, the Commission officially announced the filing of Aspen's petition. Chairman Wiley's prepared statement on the same day before the Senate Communications Subcommittee (Hearings on S. 2, S. 608 and S. 1178 (Fairness Doctrine) before the Subcommittee on Communications of the Senate Committee on Commerce, 94th Cong., 1st Sess. 54 (1975)) referred to the filing in connection with several bills dealing with political broadcasting and the fairness doctrine. In addition, the May 5, 1975, issue of *Broadcasting* magazine carried a story about Aspen's efforts to have the Commission alter its interpretation of the Section 315(a)(4) exemption. The *Washington Post* (July 18, 1975, p. A17) reported the filing of the CBS petition.

Broadcasting System.[5] It concluded that they were based upon an incorrect reading of the legislative history of the 1959 amendment, observing (Pet. App. 8a, footnote omitted) that its earlier decisions had relied upon—

> a report of a bill which was not enacted into law. The bill discussed in the August 6 House Report did indeed require that appearances by candidates must be "incidental to" another event—and this requirement was explicitly set forth in the bill. The bill as enacted, however, did not limit the exemption to appearances of candidates which were "incidental to" other news. During the floor debate in the House, Rep. Bennett of Michigan warned the House that the "incidental to" language must be deleted or the bill would not work, citing the text of the bill and the language of the House Committee report, 105 Cong. Rec. 16241. That language was stricken in conference, and in floor discussion of the conference report Bennett again took the floor to comment on the deletion of the provision: "I am glad to see that the conference substitute omits this language because the majority of conferees felt as I do, that this requirement would lead to even greater confusion than we have at present." 105 Cong. Rec. 17778. The conference bill was then adopted.

[5] The Commission did not grant all of the requested relief. Aspen had requested clarification of the Section 315(a)(2) exemption for a bona fide news interview; CBS had sought a ruling that the Section 315(a)(2) exemption encompasses presidential news conferences. The Commission deferred action on Aspen's Section 315(a)(2) request pending "a more expansive proceeding" (Pet. App. 2a) and denied CBS's request (Pet. App. 12a–16a).

Because the "incidental to" language upon which it had relied was deleted, the Commission concluded, the amendments should be interpreted so that a newsworthy program "does not lose its exempt status because the appearance of a candidate is a central aspect of the presentation, and not incidental to another news event" (Pet. App. 9a). The Commission held that Congress intended to rely upon each broadcaster's reasonable judgment that an event is newsworthy (*ibid.*), and it held that the Section 315(a)(4) exemption encompasses (1) debates between political candidates sponsored by an organization other than the broadcaster, and (2) press conferences covered live and in their entirety (*id.* at 7a, 16a). The Commission wrote that its decision would carry out the intent of the 1959 amendment and serve "the public interest by allowing broadcasters to make a fuller and more effective contribution to an informed electorate" (Pet. App. 10a).

4. The court of appeals (with one judge dissenting) upheld the Commission's decision. It found that Congress expressly delegated to the Commission the task of interpreting and administering the statute, and that the legislative history "provides substantial support" for the Commission's interpretation (Pet. App. 37a–40a). The court rejected, as "unsupported by the legislative history" (*id.* at 40a), the contention that the exemptions should be narrowly construed. The purpose of the 1959 amendments, the court found, was "broadly remedial, and evidenced a willingness by Congress to take some risks" (*id.* at 40a–41a) by experimenting with exceptions to the equal time philos-

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ophy, in order better to inform the voting public by allowing broadcasters more fully to cover political news. The court noted that (*id.* at 45a)—

> the thrust of the 1959 amendment was toward increasing broadcaster discretion to cover political news. We find the Commission's *Opinion* entirely consistent with this theme.

The court rejected the argument that congressional inaction following *Goodwill Station* and *National Broadcasting Co.* amounted to legislative approval of those interpretations of the statute. It carefully examined Congress' consideration of Section 315 after the Commission's rulings and concluded that the failure of Congress to act was entirely consistent with a legislative intent to leave the task of interpreting (and reinterpreting) the exemptions to the agency (Pet. App. 49a–50a).

Finally, the court concluded that the Commission properly announced its new view of the statute in adjudicative proceedings, relying upon cases of this Court that hold that the choice to proceed by rulemaking or by adjudication is within the discretion of the agency (Pet. App. 54a–55a). It stated that an adjudicatory reconsideration of an interpretation created through adjudication is "particularly appropriate" (*id.* at 56a) and observed that the "issues were fully aired before the Commission" (*ibid.*) in comments filed in substantially the manner that they would have been filed in a rulemaking proceeding.

ARGUMENT

We rely upon the opinions of the Commission and the court of appeals, which demonstrate that the Commission did not overstep its authority in interpreting Section 315(a)(4). There is no reason for further review.

1. Petitioners' arguments seem to start from the assumption that Section 315 is designed to provide all candidates with equal amounts of broadcast exposure. It is not. The 1959 amendment was designed to relax that rigid rule, and to provide the Commission with discretion to define the extent of that relaxation. See Section 315(d). Section 315(a) authorized the Commission to strike a delicate balance between equal exposure for all candidates and sufficient coverage of political events. See S. Rep. No. 562, 86th Cong., 1st Sess. 10, 13 (1959). A broadcaster cannot promote a particular candidate by affording him attention unrelated to the newsworthiness of his activities; that rule has been unchanged since 1934 and is unaffected by the Commission's decision here. But the 1959 amendment, and the Commission's decision here, recognize that an unqualified rule of equal exposure might inhibit broadcasters from giving exposure to any candidate or significantly reduce campaign coverage, thereby denying valuable information to the public at the same time as it crimped the discretion of a broadcaster to be selective with respect to its political coverage. See the remarks of Rep. Celler, 105 Cong. Rec. 16227 (1959).[6]

[6] See also Hearings on H.R. 7985 (Radio Broadcasting: Political Broadcast-Equal Time) before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 2 (1959) (comment of Chairman Harris).

Faced with a choice between severely limited news coverage of any candidate or greater broadcast coverage of major candidates with the attendant possibility that all candidates would not receive equal air time, Congress and the Commission have selected the latter. The Commission's belated recognition that debates and press conferences (of the sort often reprinted *verbatim* in the *New York Times*) may be news events in their own right, and not publicity devoid of news value, is unquestionably correct.

Petitioners argue (Pet. No. 76–101 at 15; Pet. No. 76–205 at 7) that the Commission has misconstrued the legislative history of Section 315(a)(4). Both the Commission and the court of appeals acknowledge that portions of the legislative history look both ways. The court of appeals, after examining the legislative history, concluded (Pet. App. 59a):

> It is the job of the Commission in the exercising of its delegated authority, and ultimately of Congress, to make these kinds of front-line determinations. We find no basis for disturbing the Commission's action here, grounded as it is on the Commission's interpretation of Congressional intent, an interpretation which we find reasonable.

We do not doubt that there is some ambiguity. But the legislative history provides "much support" for the Commission's interpretation (Pet. App. 59a). Ambiguity of this sort is properly resolved by the agency charged with interpretation and resolution of the statute.[7] *Trafficante* v. *Metropolitan Life Insurance Co.*,

[7] See also S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959); 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler); 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore), which indicate that Congress intended the Commission to have discretion to resolve matters of this sort.

409 U.S. 205, 210; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153.

Petitioner in No. 76–101 relies (Pet. 15) upon events in Congress after the 1959 amendment and the Commission's first interpretative decisions. Attributing significance to congressional failure to repudiate particular decisions is a hazardous venture, however (*Zuber* v. *Allen*, 396 U.S. 168, 185–186 n. 21; *United States* v. *Price*, 361 U.S. 304, 310–311), and there is no reason to indulge in it here. Congress' inaction must be viewed in light of its decision to delegate to the Commission discretion to decide which particular events qualify for the broadly defined news coverage exemptions. See Section 315(d). That Congress did not correct the Commission's decisions reflects the broad scope of the Commission's discretion, not Congress' view on the merits.

Petitioners raise the spectre that the Commission's decision in this case will cause the demise of the equal time rule (Pet. No. 76–101 at 13–14; Pet. No. 76–205 at 7, 16 n. 19). These concerns are not justified. The Commission's holding concerns only debates and press conferences of political candidates not created by the stations themselves. This holds to a minimum the risk that stations will manufacture publicity for favored candidates, and broadcasters' determinations that an event is newsworthy will of course be subject to Commission review under standards of good faith and rea-

sonableness. Moreover, Section 312(a)(7) of the Act, as added, 86 Stat. 4, 47 U.S.C. (Supp. V) 312(a)(7), guarantees any candidate for federal office reasonable access to broadcast facilities; and the Commission's fairness doctrine affords further protection against broadcaster attempts to promote one candidate over others.

2. The Commission did not abuse its discretion by reaching its decision in adjudicatory rather than rulemaking proceedings. As this Court explained in *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 293, quoting from *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." The Commission's choice to proceed by adjudication did not prejudice any party to the case. The petitioners in this Court (Pet. App. 56a–57a)—

> submitted lengthy comments to the Commission in opposition to the Aspen and CBS petitions. As in *Bell Aerospace, supra,* we believe the issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label.

Requiring the Commission to proceed by rulemaking rather than adjudication would "exalt form over necessity." *Securities and Exchange Commission* v. *Chenery Corp., supra,* 332 U.S. at 202.

The facts of this case make adjudicatory disposition particularly appropriate. The Commission's prior interpretations of Section 315 were issued as adjudicatory decisions, and the questions are entirely legal. The decision interprets the statutory language and legislative history, and does not involve the kind of inquiry into facts or industry experience that may more appropriately be assessed in rulemaking proceedings.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-101.

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

No. 76-205.

THE HONORABLE SHIRLEY CHISHOLM, NATIONAL ORGANIZATION FOR WOMEN, and OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

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BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Federal Communications Commission (the "Commission") was issued on September 30, 1975 and is reported at 55 F. C. C. 2d 697 (1a-22a). The opinion of the United States Court of Appeals for the District of Columbia Circuit (the "court below") affirming the action of the Commission was issued on April 12, 1976 (23a-126a). Petitions for rehearing and rehearing *en banc* were denied on May 13, 1976 (127a-131a).

QUESTIONS PRESENTED.

(1) Did the Commission abuse its discretion by issuing an interpretation of the Communications Act of 1934 holding that under certain conditions broadcasts of debates between political candidates and press conferences of political candidates may qualify as "on-the-spot coverage of bona fide news events" under Section 315(a)(4) of the Act?

(2) Did the Commission abuse its discretion by issuing a declaratory ruling interpreting Section 315(a)(4) rather than engaging in formal rulemaking?

STATEMENT.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petitions for writ of certiorari filed in No. 76-205 by the Honorable Shirley Chisholm, the National Organization of Women, and the Office of Communication of the United Church of Christ, all of whom are represented by the Media Access Project ("MAP"), and in No. 76-101 by the Democratic National Committee ("DNC"). NBC intervened in the court below in support of the Commission's decision.

The Commission's ruling, which petitioners challenge, is simply that under certain conditions broadcasts of political candidates' press conferences and debates which are presented because of the broadcaster's reasonable good faith judgment that they are newsworthy may qualify as "on-the-spot coverage of bona fide news events," and thereby be exempt from the equal time requirement of Section 315(a) of the Communications Act of 1934.[1]

Petitioners claim that the exemption in Section 315 (a)(4) for "on-the-spot coverage of bona fide news events" does not encompass broadcasts of debates or press conferences of political candidates even if considered newsworthy by the broadcaster. The court below rejected this contention, noting that as a matter of common sense political candidates' debates and press conferences are newsworthy events:

> "It seems beyond dispute from a commonsensical point of view, that the presidential press conference is an important news event. Such conferences are regularly printed in the newspapers—indeed, the *New York Times* regularly prints a transcript of each Presidential press conference. . . . Debates between major candidates are also 'news' in this respect . . ." (42a n. 20).

1. Section 315(a) of the Communications Act contains, *inter alia*, an exemption from the general equal time requirement for "(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)."

The court below thus found, in effect, that the plain reading of the exemption contained in Section 315(a)(4) required the Commission's ruling without regard to the legislative history. The court below also held that the Commission's ruling was not contrary to the legislative history of the Section 315(a) exemptions, as petitioners have consistently contended (see, *e.g.*, DNC petition at 15, MAP petition at 7-8), since the 1959 enactment of the Section 315(a) exemptions reflected a clear congressional determination to relax the equal time requirement to permit broadcasters greater ability to cover news of political events (9a, 16a, 26a; *see also* **Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce,** 86th Cong., 1st Sess. 2 (1959) (comments of Chairman Harris), quoted at 2a, 28a).[2] In affirming the Commission's ruling, the court below specifically rejected petitioners' argument that the exemptions were intended to be construed narrowly:

> "We also find petitioners' argument that the four exemptions were intended to be narrowly construed unsupported by the legislative history. Rather, we find more convincing the Commission's, and Aspen's, contention that the purpose of the 1959

2. Petitioners misread the opinion of the court below when they suggest that the court agreed with their interpretation of the legislative history but affirmed the Commission because it felt compelled to defer to the agency determination (DNC petition at 12, MAP petition at 6).

amendment was broadly remedial, and evidenced a willingness by Congress to take some risks with the equal time philosophy in order to permit broadcast coverage of on-the-spot news and to enable broadcasters more fully to cover the political news. Admittedly, Congress intended that the 1959 amendments would preserve the basic philosophy behind the equal time requirement. At the same time, however, Congress was determined to increase broadcaster discretion and allow increased live broadcast coverage of political news." (40a-41a) (footnotes omitted).[3]

Both the Commission and the court below also emphasized that Congress intended the Commission to play an important role in developing the scope of Section 315 exemptions (3a, 9a, 14a, 16a n. 20, 26a, 37a-39a, 40a, 45a, 47a, 49a, 50a, 53a, 54a, 56a, 58a). Thus the court stated:

> "It is clear . . . that Congress intended to give the Commission some leeway in interpreting the four exemptions and in applying them to particular program formats in order to further the basic purpose of the amendment, '[To] enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree.' That the Commission has considerable discretion in this area is clear from the Senate Report . . . [quoting from S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959)]" (37a-38a) (footnote omitted).[4]

3. Other references in the opinions below to the expansive nature of the exemptions appear at 12a, 15a, 26a, 37a, 40a, 41a, 45a, 53a, and 58a.

In this regard the court below underscored the agency's finding that its new ruling would serve the public interest "by allowing broadcasters to make a fuller and more effective contribution to an informed electorate" (35a, quoting from 10a), and thus accomplish the very result Congress hoped to achieve by the enactment of the exemptions.[5]

The court below also dealt with the procedural contention advanced by petitioner MAP that the Commission should have engaged in formal rulemaking rather than issuing the declaratory ruling which is at issue here (MAP petition at 15-18). The court noted that an administrative agency is permitted to correct an error in its interpretation of a statute (54a) and that "the choice whether to proceed by rulemaking or adjudication is pri-

4. The legislative intent to allow the Commission great discretion in developing the scope of the exemptions was evident from the congressional decision "not to legislate in detail, but rather to set out broad categories for exemption of news-related coverage and leave the Commission with the task of implementing Congressional intent." (38a).

5. The court below also dealt with petitioners' general contention that congressional failure to overrule the Commission's decisions in **The Goodwill Station, Inc. (WJR)**, 40 F. C. C. 362, 24 P & F Radio Reg. 413 (1962), **National Broadcasting Company, Inc. (Wyckoff)**, 40 F. C. C. 370, 24 P & F Radio Reg. 401 (1962), and **Columbia Broadcasting System, Inc.**, 40 F. C. C. 35, 3 P & F Radio Reg. 2d 623 (1964), demonstrated the correctness of those decisions and imbued them with the force of law (MAP petition at 10-11 n. 10, DNC petition at 15). On this point the court stated that the legislative failure to overrule these earlier decisions "sheds little light on Congress' intent, other than to demonstrate adherence to the basic philosophy of the equal time requirement, since such inaction must be viewed against the background of Congress' decision to leave the Commission some discretion to decide which particular events should qualify for the broadly defined news coverage exemptions." (49a-50a). *Compare* **Sierra Club v. EPA,** No. 74-2063 (D. C. Cir. August 2, 1976) (Slip Opinion at 23-24).

marily one for the agency regardless of whether the decision may affect agency policy and have general prospective application" (55a).[6]

The opinion of the court below was handed down on April 12, 1976 and petitions for rehearing or rehearing *en banc* were denied on May 13, 1976. On July 23, 1976, DNC filed its petition for certiorari requesting "that the matter be heard on an expedited basis." (DNC petition at 2). MAP's petition for certiorari similarly urges expedition (MAP petition at 18). Nevertheless, MAP waited 90 days from the last action of the court below before filing its petition. On September 1, 1976 DNC withdrew its formal motion to expedite on the ground that "the matter cannot be fully and adequately briefed in the short period remaining before the date of election."

6. The court had noted earlier in its opinion the congressional intent to give the Commission full flexibility and discretion to interpret the new exemptions by means of rulings in individual cases as well as by formal rule-making (37a-39a, 40a-50a, 53a). In its petition DNC also concedes that it is "Commission practice" to handle questions "by interpretive rulings on a case-by-case basis" to be later "collated and published by the Commission in the Federal Register as a guide and outline." (DNC petition at 5).

ARGUMENT.

I.

The Commission's Ruling Involves Only a Narrowly Confined Interpretation Which Is Clearly Within Its Regulatory Authority.

That the Commission ruling which is challenged here may have high political visibility because this is an election year does not, of course, enlarge the dimension of the legal issue involved.

The legal issue remains the narrow one of whether the Commission abused its discretion to interpret the Communications Act by issuing the carefully-conditioned, narrow interpretive ruling challenged here. Section 315(a)(4) of the Communications Act exempts from equal time requirements "on-the-spot coverage of bona fide news events." Specifically, the Commission decided only that broadcasts of political candidates' debates and press conferences which present the following factual situation are covered by this provision:

(a) the event is initiated by non-broadcast entities;

(b) the event is covered "live" and, in the case of a press conference, in its entirety by the broadcaster;

(c) the broadcaster determines that the event is a bona fide news event and is worthy of presentation;

(d) there is no evidence of broadcaster intent to carry the event for the purpose of favoring a particular candidate.

The narrowness of the Commission's ruling is highlighted by the fact that neither the ruling itself nor its affirmance by the court below serves to resolve many other possible related questions in this area, such as whether debates which are instituted by broadcasters might qualify as "bona fide news events," or whether excerpts of press conferences can also qualify. The exact scope of Section 315(a)(4) will continue to evolve from agency rulings on specific complaints challenging a broadcaster's exercise of discretion and by further interpretations as additional experience is garnered. Under these circumstances, there is hardly any pressing need for this Court's review of this particular ruling.

Petitioners assume that reversal of the Commission's ruling will increase coverage of minority parties and fringe candidates (MAP petition at 13). But petitioners have failed to demonstrate any basis for such an assumption. As the Commission and the court below both recognized, historically the result of the Commission's restrictive **Goodwill Station, Wyckoff,** and **CBS** rulings was not to increase coverage of minority parties and candidates, but to discourage broadcasters from covering as news events press conferences and debates during election years to the extent that candidates were involved, particularly where there was a significant number of fringe candidates (10a, 14a, 31a). Indeed, had the Commission not reversed those rulings, the currently scheduled debates between the two major presidential candidates would not be televised because a dozen or more fringe candidates might each have to receive a corresponding allocation of time, an allocation that would be totally unwarranted and impractical and one which broadcasters could not be expected to make. As is well known, before the Commission's reversal of **Goodwill Station, Wyckoff** and **CBS** there was

no live complete network coverage of national candidates' press conferences or debates occurring in a presidential election year.

The Commission's ruling, of course, does not mean that minority candidates and fringe parties are excluded from network coverage. On the contrary, to the extent that minority candidates and fringe parties participate in newsworthy events, they qualify for the Section 315(a)(4) exemption and thus may obtain exposure they would not have should the exemptions be interpreted restrictively. Surely, any claims that the ruling will cause some monumental decrease in broadcast access of minority parties and fringe candidates for newsworthy events must be regarded as highly fanciful, not borne out by the record in this case or by reasoning or experience.

In any event, these claims are hardly now appropriate for resolution by this, or any other Court. As the court below stated, "this case involves issues in an intensely political area which this court enters with great reluctance. *It is the job of the Commission, in the exercise of its delegated authority, and ultimately of Congress, to make these kinds of front-line determinations.*" (59a) (emphasis added).

II.

The Commission's Decision to Issue a Declaratory Ruling Rather Than Engage in Formal Rulemaking Was Within Its Discretion.

Petitioner MAP also seeks review of a purely procedural matter: whether the Commission should have en-

gaged in formal rulemaking with notice and invitation to comment, rather than issuing its decision in the form of the declaratory ruling challenged here [7] (MAP petition at 15-18).

This issue is rather abstract and technical, certainly as to petitioners, both of whom presented their viewpoints to the Commission twice—once prior to the Commission's decision and once in petitions to the Commission for a stay. As the court below succinctly said:

> ". . . [W]e believe the issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments. *Cf. Banzhaf v. FCC*, 132 U. S. App. D. C. 14, 36, 405 F. 2d 1082, 1104 (1968), *cert. denied*, 396 U. S. 842 (1969)." (56a-57a) (footnote omitted).

In any event, this procedural contention is without merit. In enacting the 1959 amendments to Section 315, Congress deliberately refused to legislate "in complex detail" but chose rather to delegate to the Commission the task of implementing the statutory intent by the issuance of *both* general policy guidelines *and* specific rulings. 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler); *see also* 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore).[8] Such duality is not new in the regulatory field. As the court below observed (55a), administrative agencies frequently exercise their discretion in choosing among the procedures available to them, sometimes making particular case adjudications, sometimes issuing declaratory rulings and sometimes issuing broad policy guidelines. See **NLRB v. Bell Aerospace Co.,** 416 U. S. 267, 290-295 (1974); **NLRB v. Wyman-Gordon Co.,** 394 U. S. 759, 772 (1969) (Black, J., concurring); **SEC v. Chenery Corp.,** 332 U. S. 194, 201-203 (1947).

The declaratory interpretation is a particularly appropriate procedural device here and has ample precedent since the Commission's earlier decisions on this subject in **Goodwill Station, Wyckoff** and **CBS** were also rendered without a rulemaking proceeding.[9] There has been no dearth of comment here by interested parties and petitioners can claim no prejudice to them or surprise at the Commission's utilization of an accepted Commission procedure. Under the circumstances, it is clear that this issue is not one meriting review.

7. DNC does not argue this point but rather appears to concede that it is incorrect. See footnote p. 6 *supra.*

8. See also S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959): "As experts in the field of radio and television, the Commission has gained a workable knowledge of the type of programs offered by the broadcasters in the field of news, and related fields. Based on this knowledge and other information that it is in a position to develop, the Commission can set down some definite guidelines through rules and regulations *and wherever possible by interpretations.*" (emphasis added)

9. The **CBS** decision was itself a declaratory ruling, as were the decisions in **KWYX Broadcasting Co.,** 19 P & F Radio Reg. 1075, *aff'd sub nom.* **Brigham v. FCC,** 238 F. 2d 828 (5th Cir. 1960), and **In Re Petition of United Way,** – F. C. C. 2d –, FCC Mimeo 75-1091 (September 25, 1975). Indeed, the decision in the so-called *"Lar Daly"* case, **Columbia Broadcasting System, Inc.,** 18 P & F Reg. 238, *reconsideration denied,* 26 F. C. C. 715, 18 P & F Radio Reg. 701 (1959), which led to the adoption of the Section 315 exemptions, was itself a reversal of prior policy without any rulemaking procedure and was entitled "an interpretive opinion." 26 F. C. C. at 715.

CONCLUSION.

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-101

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.,
Respondents

No. 76-205

THE HONORABLE SHIRLEY CHISHOLM,
NATIONAL ORGANIZATION FOR WOMEN, and
OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT CBS INC. IN OPPOSITION

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IN THE

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OCTOBER TERM, 1976

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT CBS INC. IN OPPOSITION

OPINIONS BELOW

The declaratory ruling of the Federal Communications Commission was contained in a Memorandum Opinion and Order released September 30, 1975, 55 F.C.C.2d 697, set forth at pages 1a-22a of the Appendix to the Democratic National Committee Petition for Certiorari ("DNC App."). The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's order, Judge Wright dissenting, in an opinion entered April 12, 1976 (DNC App. at 23a-126a). The Court of Appeals denied rehearing and rehearing *en banc* in orders entered May 13, 1976 (DNC App. at 127a-131a).

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission erred in holding that on-the-spot broadcast coverage of candidate press conferences and certain candidate debates is within the scope of the "bona fide news events" exemption from the "equal opportunities" requirement of Section 315 of the Communications Act.

2. Whether the Commission was required by law to engage in rulemaking proceedings before adopting its declaratory ruling on the applicability of Section 315 to candidate press conferences and debates.

STATEMENT OF FACTS

This case involves a declaratory order of the Federal Communications Commission interpreting the applicability of the "equal opportunities" requirement of Section 315 of the Communications Act[1] to broadcast news coverage of press conferences and debates involving candidates for political office.

Under Section 315, a broadcast licensee who "permit[s]" a legally qualified candidate for office to "use" his broadcasting station must afford equal opportunities for use of the station to all other candidates for that

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[1] 47 U.S.C. § 315 (1970).

office. A controversial Commission decision [2] applying the equal opportunities requirement to news coverage led Congress to amend Section 315 in 1959. The amendment provides that the appearance by a candidate in the course of certain common forms of news broadcasts does not constitute a "use" of broadcast facilities for purposes of the equal opportunities requirement. The categories of news broadcasts exempted by this amendment include, *inter alia*, "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." [3]

This case arose out of two petitions filed with the Commission. One was submitted by respondent CBS Inc. ("CBS") in July, 1975, shortly after President Ford announced his candidacy for reelection. The CBS petition, noting that the President had become a "legally qualified candidate" for purposes of Section 315 more than 15 months in advance of the general election, sought a declaratory ruling that broadcast licensees who present on-the-spot coverage of Presidential press conferences in the exercise of their professional news judgment will not become obligated to provide equal time to every opposing candidate. The CBS petition asked the Commission to overrule its 1964 declaratory ruling [4] that coverage of the press conferences of Presidential candidates could not qualify for exemption from the equal opportunities requirement either as bona fide news interviews

[2] *Columbia Broadcasting System, Inc. (Lar Daly)*, 18 Pike & Fischer, R.R. 238, *recon. denied*, 26 F.C.C. 715 (1959).

[3] 47 U.S.C. § 315(a)(4) (1970). The amendment also exempts bona fide newscasts, bona fide news interviews, and bona fide news documentaries (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary). 47 U.S.C. §§ 315(a)(1), (a)(2), & (a)(3).

[4] *Columbia Broadcasting System, Inc.*, 40 F.C.C. 395 (1964).

or as on-the-spot coverage of bona fide news events.[5] The other petition was submitted to the Commission by the Aspen Institute Program on Communications and Society ("Aspen"). The Aspen petition asked the Commission to reexamine two 1962 decisions [6] which had held that broadcast coverage of candidate debates could not qualify for exemption from Section 315 as "on-the-spot coverage of bona fide news events." Several individuals and organizations, including petitioners The Honorable Shirley Chisholm ("Chisholm"), National Organization for Women ("NOW"), and Democratic National Committee ("DNC"), submitted comments to the Commission in response to the CBS and Aspen proposals.

The Commission acted on the petitions by a Memorandum Opinion and Order released on September 30, 1975. In that order the Commission overruled its prior interpretation of Section 315(a)(4), as applied to press conferences and debates, on the ground that it had been based on a misreading of the legislative history underlying the 1959 amendments. The Commission held that the exemption for "on-the-spot coverage of bona fide news events" embodied in Section 315(a)(4) encompassed candidate press conferences carried "live and in their entirety," and candidate debates of the type involved in the 1962 cases,[7] if coverage was the result of the broadcast licensee's good faith journalistic judgment.

[5] CBS limited its petition to Presidential press conferences because of the singular newsworthiness of the Presidency, as well as the special importance of keeping open this avenue of communication between the President and the public. Contrary to the assertion by petitioners in No. 76-205 (Petition at 4), however, CBS did not argue "that press conferences of candidates for offices other than the Presidency should still remain subject to the rule of equal opportunities."

[6] *The Goodwill Stations, Inc.*, 40 F.C.C. 362 (1962); *National Broadcasting Co. (Wyckoff)*, 40 F.C.C. 370 (1962).

[7] *Goodwill* and *Wyckoff* both involved remote coverage of debates conducted under the auspices of groups independent of the broadcaster ("non-studio debates").

Chisholm, NOW, and DNC petitioned for review in the United States Court of Appeals for the District of Columbia Circuit. On April 12, 1976, the court issued its decision affirming the Commission's order, Judge Wright dissenting. Rehearing and rehearing *en banc* were denied on May 13, 1976.

DNC filed a petition for a writ of certiorari on July 23, 1976 (No. 76-101). Chisholm, NOW, and the Office of Communication of the United Church of Christ submitted a joint petition on August 11, 1976 (No. 76-205).

ARGUMENT

There is no sound reason for the Court to grant certiorari in this case. The decision of the court below does not conflict with any prior holding of this Court or of any circuit court of appeals. It involves a narrow issue of statutory construction that received careful consideration by the Commission and the Court of Appeals, and no useful purpose would be served by further review. The decision below reflects a construction of Section 315 of the Communications Act fully consistent with the Congressional intent evident in the plain language and legislative history of the statute. Moreover, the decision promotes the goals of the First Amendment by avoiding inhibitions on the free flow of news. Indeed, as recent decisions by this Court make clear, a contrary interpretation of Section 315 would raise the most serious First Amendment questions.

I. Construction of Section 315

The Commission's declaratory ruling presents a logical interpretation of Section 315 that gives effect to the plain language of the provision exempting "on-the-spot coverage of bona fide news events." As the Commission recognized, it is indisputable that some candidate press conferences and debates are generally considered news-

worthy[8] and therefore within the commonly-accepted meaning of the term "news event." Absent some clear indication that Congress intended a different meaning of "news event," the Commission's earlier interpretation categorically excluding press conferences and debates from the Section 315(a)(4) exemption could not stand.

The Commission exhaustively examined the legislative history and found that it did not reflect such a Congressional intent to exclude press conferences or debates from the scope of the "news events" exemption.[9] The majority of the court below agreed. Moreover, the court found "substantial support" in the legislative history for the Commission's holding that such news events are "bona fide" for purposes of Section 315 when covered in the exercise of the broadcaster's good faith journalistic judgment. In particular, the court noted that the Commission's interpretation drew support from the broad Congressional policies repeatedly expressed in the legislative record.

Primary among these policies was the desire of Congress to encourage coverage of political news and to restore to broadcasters greater journalistic discretion. As the court below found, the "basic purpose" of the 1959 amendment was:

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[8] As the Court of Appeals observed, the inherent newsworthiness of such events is "no greater or less than that of 'political conventions and activities related thereto,' events expressly within the scope of the exemption." Slip Opinion at 20, DNC App. at 42a.

[9] The Commission determined that it had misread the legislative history when it ruled in 1962 that Congress intended the on-the-spot news coverage exemption to apply only where the candidate's appearance was "incidental" to the event being covered. As the Commission recognized in its ruling under review, an "incidental" test did appear in the 1959 House bill to amend Section 315 but was dropped from the final Conference Committee bill except with regard to news documentaries. *Memorandum Opinion and Order*, 55 F.C.C. 2d at 703-05, DNC App. at 7a-9a; see Slip Opinion at 11-12, DNC App. at 33a-34a.

> "[t]o enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree." [10]

Echoing this theme, Chairman Harris of the House Committee on Interstate and Foreign Commerce observed that the concept of absolute equality among candidates must give way in part to two other "worthy and desirable" objectives:

> "First, the right of the public to be informed through broadcasts of the political events; and Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events." [11]

Congress chose to accomplish this goal by establishing a body of exemptions "which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of the broadcasters and networks." [12] Thus, the 1959 amendment reflects a Congressional decision to rely not on mechanical rules but on the journalistic commitment of the broadcast press to ensure full, fair news coverage of political candidates.[13] As Senator Case stated:

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[10] Slip Opinion at 15, DNC App. at 37a, quoting 105 Cong. Rec. 14451 (1959) (remarks of Senator Holland).

[11] *Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 2 (1959) (comment of Chairman Harris), quoted in Slip Opinion at 6, DNC App. at 28a.

[12] 105 Cong. Rec. 17782 (1959) (remarks of Chairman Harris), quoted in Slip Opinion at 23, DNC App. at 45a.

[13] The Senate Report expressly stated that the Committee members had "faith in the maturity of our broadcasters and their recognition to serve the public interest." S. Rep. No. 562, 86th Cong., 1st Sess. 14 (1959). See also 105 Cong. Rec. 3171 (1959) (remarks of Representative Cunningham); *id.* at 5405 (remarks of Senator Allott).

> "An informed electorate is essential in democracy. Feeding the news to the public by a measuring spoon or regulating its quantity by a stopwatch is hardly the way to accomplish this desired objective. Rather, reporting of the news should be left to the discretion of the news media." [14]

The Court of Appeals found no support in the legislative history for petitioners' contention that Congress intended a narrow construction of the four exemptions.[15] In light of the "substantial support" for the Commission's construction and Congress' evident intention to look to the Commission for interpretation and application of Section 315,[16] the Court of Appeals properly decided to defer to the Commission's construction of the statute.[17]

Petitioners do not suggest that the Commission lacks authority to interpret the equal opportunities provisions, or that the legislative history does not provide substantial support for the Commission's interpretation. Rather, they argue—as did Judge Wright in his dissent—that the Commission should have accorded more weight to certain

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[14] 105 Cong. Rec. 8746 (1959).

[15] See Slip Opinion at 18, DNC App. at 40a.

[16] See Slip Opinion at 15-16, DNC App. at 37a-38a, quoting S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

[17] The DNC petition incorrectly suggests that the Court of Appeals "candidly admitted inability to find a clear legislative history" to support the Commission's decision. DNC Petition at 12. To the contrary, the court determined only that the legislative history is inconclusive on the issue of whether Congress, in creating exemptions to Section 315, "intended specifically to include or exclude non-studio debates and candidate's press conferences." Slip Opinion at 15, DNC App. at 37a. The court found that the legislative history was quite clear, however, in expressing the policies which Congress intended to promote, and that those legislative policies provided substantial support for the Commission's decision. Slip Opinion at 15-23, DNC App. at 37a-45a.

isolated parts of the voluminous legislative history.[18] The arguments raised in the petitions for certiorari were fully disposed of in the opinions of the Commission and the Court of Appeals, and there is no reason for this Court to undertake its own examination of the legislative record.

Contrary to Judge Wright's dissent, the Commission's interpretation of the "news events" exemption is fully consistent with the other provisions of Section 315. There is no basis for the contention of petitioners in No. 76-205 that the Commission's decision creates an exemption "which effectively makes the other three exemptions superfluous." [19] Each of the four exemptions to Section 315 relates to a different news format, and while the categories occasionally may overlap, no one category could ever entirely subsume the other three. Simply stated, live on-the-spot coverage of a news event is not the same as a newscast, news interview, or news documentary. Nor has the Commission provided an exemption "which swallows the rule of equal opportunities by effectively repealing it." [20] Section 315 continues to apply not only to coverage of news events outside the scope of the Section 315(a)(4) exemption as construed by the Commission, but also to many other common types of candidate appearances, including:

—candidate appearances in broadcast time purchased for use by the candidate;

—candidate appearances in broadcast time made available by the licensee without charge for unrestricted use by the candidate; [21]

—candidate appearances in entertainment programs; [22]

—candidate appearances in non-regularly scheduled news interview broadcasts;

—candidate appearances in news documentaries where the candidate is a central subject of the documentary.

The 1960 resolution suspending Section 315(a) for that year's Presidential and Vice-Presidential campaigns does not, as Judge Wright suggests, indicate that Congress intended on-the-spot coverage of candidate debates to be outside the scope of the 1959 exemptions. While the 1959 amendment and the Commission's interpretation of it in this case apply only to specified forms of news coverage, the 1960 resolution had the broad purpose of

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[18] Petitioners in No. 76-205 contend, for example, that the Commission should have found candidate debates ineligible for exemption as "news events" because Congress considered but rejected several bills that would have provided a specific exemption for debates. Petition at 9 n.9. The legislative history shows, however, that deletion of the debate provision represented not a substantive alteration in the bill but rather a change in degree of specificity. Early drafts of the 1959 statute attempted to list exhaustively the various types of programs that could be exempt from Section 315; the final version, on the other hand, opted for a more general list of broad program categories. Slip Opinion at 16-17 n.17, DNC App. at 38a-39a n.17.

In the case of press conferences, not even this weak argument of Congressional rejection of other bills is available. Indeed, the only mention of press conferences in the legislative history indicates that Congress intended to permit broadcasters to cover such events without incurring equal opportunities obligations. Expressing the need for news coverage exemptions to Section 315, Representative Macdonald stated on the House floor:

> "If [a] ruling [applying Section 315 to news coverage] were to be followed vigorously, minor candidates for major offices, including a variety of freaks and crackpots could create chaos on the airlanes before and during political campaigns. In 1956, for example, 9 minor contenders campaigned for the presidency, gaining from 8 to 175,000 votes apiece. *Had each of these demanded equal time as President Eisenhower after his news conferences, the confusion can easily be imagined.*" 105 Cong. Rec. 16236 (1959) (emphasis added).

[19] Petition at 14 n.17.

[20] *Id.*

[21] Indeed, it was these types of unrestricted candidate appearances that the original framers of the equal opportunities requirement sought primarily to regulate. See generally S. Rep. No. 562, 86th Cong., 1st Sess. 6, 8-9 (1959).

[22] See *Paulsen* v. *FCC*, 491 F.2d 887 (9th Cir. 1974).

facilitating any type of coverage of, or provision of time to, candidates for President and Vice-President.[23]

There is no basis for Judge Wright's contention that Congress "ratified" the Commission's earlier, contrary interpretations of Section 315 by failing to overrule them legislatively. Just last term this Court restated the fundamental principle that:

> "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Barrett* v. *United States*, 423 U.S. 212, 223 n.8 (1976), quoting *Zuber* v. *Allen*, 396 U.S. 168, 185-86 n.21 (1969).[24]

This is not a case involving reenactment of a statute which arguably could be construed as approval of an outstanding interpretation of it. Congress never has reenacted the exemptions contained in the 1959 amendment.[25] Indeed, as the Court of Appeals observed, Congress has done "nothing that can be interpreted as active approval of the Commission's 1962 interpretation." To the contrary,

> ". . . Congressional inaction in this instance is entirely consistent with the interpretation that Congress was willing to leave to the Commission the interpretation of the exemptions as they applied to specific program formats. In this sense, Congressional acquiescence in the Commission's [earlier] interpretation does not indicate that it was the only, or the best, interpretation." [26]

[23] See generally S. Rep. No. 1539, 86th Cong., 2d Sess. (1960). Indeed, the debates that were televised in the aftermath of the 1960 resolution were "studio debates" conducted under the auspices of the broadcast networks and therefore would not have been exempt under the Commission's ruling in the present case.

[24] See also *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

[25] The court below rejected the notion that the 1962 and 1964 rulings had been incorporated into law through "reenactment" when Section 315 was amended by the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972). As the court noted, "[t]he FECA amendments [to Section 315] were in no way concerned with the equal time exemptions, and, in fact, by-passed Section 315(a) altogether." Slip Opinion at 29, DNC App. at 51a.

The Commission's decision will not lead to a reduction of the amount of broadcast time devoted to minority party candidates, contrary to the contention of petitioners in No. 76-205. Petitioners mistakenly assume that equal opportunities requirements actually increase the amount of air time devoted to such candidates. In reality, however, a broadcaster faced with a limited supply of air time and a large number of candidates for office [27] frequently is not in a position to provide equal time to numerous candidates for an office. Broadcasters therefore seek to avoid incurring Section 315 obligations, and the practical result is that where equal opportunities requirements apply, coverage of all candidates is drastically reduced, thereby depriving the public of valuable news and information.[28] The exemptions to Section 315 enable broadcast journalists to cover serious candidates

[26] Slip Opinion at 27-28, DNC App. at 49a-50a.

[27] For example, in 1972 there were at least 11 candidates for President; in 1968, 14. See Slip Opinion at 9 n.7, DNC App. at 31a n.7. A report dated August 19, 1976 on file at the Federal Election Commission lists some 89 candidates for the Presidency in 1976, not including those identified as Democrats or Republicans.

[28] Congress recognized this problem in 1959 when it voted to exempt bona fide news programs from equal opportunities requirements. As the Senate Report noted:

> "The inevitable consequence [of applying the equal opportunities concept to news] is that a broadcaster will be reluctant to show one political candidate in any news-type program less he assumes the burden of presenting a parade of aspirants." S. Rep. No. 562, 86th Cong., 1st Sess. 9 (1959), quoted in Slip Opinion at 6 n.5, DNC App. at 28a n.5.

without undertaking the impractical burden of providing equal time to a multitude of fringe candidates.

By freeing the broadcast press to cover important news events involving candidates, the Commission's construction of Section 315 promotes the interest in an informed public that underlies the First Amendment's guarantee of a free press. Removal of the inhibitions imposed by the equal opportunities requirement encourages the "speech concerning public affairs" that this Court has called "the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). See generally *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976). Of course, journalistic discretion carries with it potential for abuse, but this risk is outweighed by the need for a free and vigorous press:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124-25 (1973).

The construction of Section 315 proposed by petitioners would raise serious First Amendment questions—questions which quite properly ought to be avoided. See, *e.g.*, *Schneider* v. *Smith*, 390 U.S. 17, 26 (1968). The chilling effect of this construction of Section 315 on broadcast coverage of important news events, and the corollary interference with the public's "right to know," would be

only slightly less onerous than a direct ban on coverage of these events. Just recently, this Court confronted a similar threat to First Amendment values in the form of a Florida statute granting candidates a right to equal space to respond to newspaper criticism. As the Court said in striking down that law:

> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257 (1974) (footnote omitted), quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964).

II. The Commission's Compliance with the Administrative Procedure Act

Petitioners in No. 76-205 request that this Court grant certiorari to consider the question of the Commission's compliance with the Administrative Procedure Act ("APA") in this case. They argue that in adopting its new interpretation of Section 315(a)(4), the Commission was obliged to engage in notice-and-comment rulemaking pursuant to Section 4 of the APA, 5 U.S.C. § 553 (1970), and that the Court of Appeals' holding to the contrary is inconsistent with principles set forth in prior decisions of this Court.

There is no basis for petitioners' contention. This Court has made clear that even where an agency is engaged in more than straightforward statutory construction—where it is "filling in the interstices" of a statute or developing new legal standards that will in-

evitably have application in future cases—the agency has discretion in determining whether to employ adjudicatory or rulemaking proceedings: An agency "is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).[29]

Here the Commission's decision to act by declaratory order rather than notice-and-comment rulemaking was particularly appropriate in light of the fact that the only question at issue was one of statutory construction. Indeed, the APA requirements of notice and comment in connection with rulemaking simply have no application to interpretations of a statute by the agency, even if those interpretations take the form of "interpretative rules." Congress exempted interpretative rules from 5 U.S.C. § 553 because the purpose of the notice-and-comment procedure is to develop a factual record upon which the agency can act, and to provide interested parties with an opportunity to comment on what policies should be formulated by the agency. These considerations have no application to an agency's interpretation of a

[29] See also *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 421 (1942). It is noteworthy that the Court in *Bell Aerospace* held that rulemaking was unnecessary even though it concededly "would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course." 416 U.S. at 295.

Petitioners' reliance on the combined effect of the plurality and dissenting opinions in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), is misplaced. The limited significance of that case was explained by this Court in *Bell Aerospace*. See 416 U.S. at 293-94. In any event, *Wyman-Gordon* is irrelevant to the case at hand. In *Wyman-Gordon* the agency attempted to formulate policy and adopt a legislative rule of general application in the course of an adjudicatory proceeding. That is a far cry from the Commission's action in this case, which involved only interpretation of the meaning of a statute and its legislative history.

statute, which involves construction of the language of the statute and its legislative history and is "subject to plenary judicial review."[30] The Commission correctly proceeded by declaratory order in its 1962 and 1964 cases interpreting Section 315(a)(4) in the context of press conferences and debates, and it was equally appropriate for it to act by declaratory order to overrule those decisions.

Finally, it bears emphasis that the views of petitioners were in fact presented at length and fully considered by the Commission.[31] Moreover, under Section 405 of the Communications Act, 47 U.S.C. § 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, any other interested parties could have filed petitions for reconsideration of the Commission's declaratory ruling whether or not they participated at earlier stages of the proceeding.[32] No such petitions for reconsideration were filed.

In sum, rulemaking proceedings were not legally required in this case, all interested persons had ample opportunity for the presentation of views to the Commission, petitioners' views in fact were presented, and no useful purpose would be served by requiring the Commission now to initiate rulemaking proceedings.

[30] Staff of Senate Comm. on the Judiciary, *Report on Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 18 (Comm. Print 1945). See, *e.g.*, *Pickus* v. *United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974); *Eastern Kentucky Welfare Rights Org.* v. *Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974); *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 763 n.12 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974).

[31] Petitioners DNC, Chisholm and NOW filed extensive comments on the CBS and Aspen petitions prior to the Commission's ruling.

[32] In *Banzhaf* v. *FCC*, 405 F.2d 1082, 1104 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)—a case in which the Commission promulgated a clearly *substantive* rule without giving notice to or receiving comment from any parties (not even the station named in the complaint)—the court relied upon the petition for reconsideration provision as full protection for the rights of those not originally participating in the case.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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September 10, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-101

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

No. 76-205

THE HONORABLE SHIRLEY CHISHOLM, ET AL.,
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v.

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Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported. It is reproduced as Appendix 2 to the petition filed by the Democratic National Committee (DNC). The *Memorandum Opinion and Order*, comprising a declaratory order, of the Federal Communications Commission (Commission) is reported at 55 F.C.C.2d 697 (1975) and is reproduced as Appendix 1 of the DNC petition.

JURISDICTION

The order of the court of appeals denying rehearing of its prior order affirming the action of the Commission was entered on May 13, 1976. The DNC petition for writ of certiorari was filed on July 23, 1976 and the petition of The Honorable Shirley Chisholm, *et al.* (Chisholm) was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED[2]

1. Whether the court below erred in holding that the Commission had acted within its permissible discretion in changing its interpretation of the "on-the-spot coverage of bona fide news events" exemption from the equal opportunities requirement of Section 315(a) of the Communications Act of 1934, as amended, to include within that exemption broadcast coverages of non-studio debates between candidates and of press conferences by candidates.

2. Whether the court below erred in concluding that the Commission was not required to proceed by informal

[1] The time for non-federal respondents to file briefs in opposition to the DNC petition was extended to September 10, 1976.

[2] Our statement of "questions presented" is based upon both petitions.

rulemaking, and could instead proceed by declaratory order, in announcing a changed interpretation of the Section 315(a)(4) exemption.

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), is set forth in the DNC petition at Appendix 4 and in the Chisholm petition, in pertinent part, at page 3.

STATEMENT

In 1959, Congress amended Section 315(a) of the Communications Act of 1934, as amended, to exempt from the equal opportunities requirement four categories of news coverage: bona fide newscast, bona fide news interview, bona fide news documentary, and on-the-spot coverage of bona fide news events (the last sometimes referred to herein as the (a)(4) exemption).[3] The broad purpose of the legislation was to permit broadcast journalism to provide more complete coverage of political candidates in news-type programs, without the strictures of equal opportunities obligations to all other candidates.[4] The legislative history makes clear that Congress did not undertake to define with precision the specific content of the (a)(4) exemption, but instead left that task to the Commission.[5]

[3] P.L. 86-274, § 1, 73 Stat. 557, amending 47 U.S.C. § 315.

[4] *See, generally*, S. Rep. No. 562, 86th Cong., 1st Sess. (1959); Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., comment of Chairman Harris at 2 (1959).

[5] *See* S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959); Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 96 (1959).

In two 1962 rulings involving non-studio debates between gubernatorial candidates, the Commission held that live broadcast coverage of such debates would not qualify for the on-the-spot coverage of a bona fide news event exemption.[6] Similarly, in a 1964 ruling the Commission held that live broadcast coverage of an incumbent president's press conference would not qualify under this exemption.[7] For a period of years these three rulings (hereinafter referred to as the *Wyckoff*, *Goodwill Station* and *1964 CBS* rulings) were considered by the Commission, the broadcast industry, and presumably others to be the applicable law.

In 1975, in response to separate petitions from the Aspen Institute Program on Communications and Society (Aspen Institute) and CBS Inc. (CBS), the Commission re-examined its *Wyckoff*, *Goodwill Station* and *1964 CBS* interpretations. After considering comments from DNC, the Honorable Shirley Chisholm, the National Organization for Women and others (including 1976 presidential candidates), the Commission (two Commissioners dissenting) issued a declaratory order announcing that it was reversing its interpretations and henceforth would consider good faith on-the-spot broadcast coverage of non-studio debates between candidates and of candidate press conferences as qualifying under the on-the-spot coverage of a bona fide news event exemption.

Petitioners DNC and Chisholm sought review in the United States Court of Appeals for the District of Columbia Circuit. The court (one Judge dissenting) affirmed the Commission, concluding that the Congress had assigned to the Commission the task of giving specific content to these exemptions and that the Commission had acted within its permissible discretion in reversing its

[6] National Broadcasting Co. (Wyckoff), 40 F.C.C. 370 (1962); The Goodwill Station, Inc., 40 F.C.C. 362 (1962).

[7] Columbia Broadcasting System, Inc., 40 F.C.C. 395 (1964).

earlier interpretations. The court also found no infirmity in the Commission's procedure. Rehearing was denied.

American Broadcasting Companies, Inc. (ABC) operates national television and radio networks and is the licensee of television and radio stations in a number of communities. It has welcomed the Commission's ruling, because of the potential for greater news coverage of principal and major party candidates.

ARGUMENT

Petitioners advance essentially two reasons for granting the writ. The first is that this case "concerns an important issue with broad ramifications" (Chisholm petition, p. 7). The second is that the procedure followed by the Commission "conflicts with and misapplies principles set forth by this Court". (Chisholm petition, p. 15).

I. This Case Does Not Present An Issue Of Sufficient Importance To Warrant Review

By its reinterpretation of the Section 315(a)(4) exemption, the Commission has undoubtedly expanded the amount of news-type coverage which broadcasters may give to some political candidates, without incurring equal opportunities obligations to other candidates. Potentially at least, this is true at all levels of government—federal, state and local. However, it is questionable how much impact the Commission's ruling will have beyond a few major races.

The ruling is narrow, even if its logic may extend beyond debates and press conferences to some other news events. This is because in the case of all such events the broadcaster must still make the judgment that on-the-spot coverage is warranted. As a practical matter, ABC considers it unlikely that the Commission's ruling is going to have vast impact. Its significance appears to

be primarily in the case of contests such as the current presidential campaign.

However, even accepting petitioners' thesis that the ruling will have broad ramifications at all levels of the electoral process, it does not follow that the Court is being asked to review an important *legal* question (see Rule 19(b)). Many administrative agency rulings have broad economic, social or political impact. Yet this fact does not mean that they present important issues of law. We respectfully suggest that the question to be resolved on these petitions for writ of certiorari is whether the Commission's action, and the lower court's affirmance thereof, involved something other than routine application of well established legal principles.

In adopting the 1959 amendments to Section 315 Congress intended to relax the strict, mechanistic equal opportunities rule in order to permit expanded news coverage of political candidates by the broadcast media.[8] It did so with the recognition that there were some risks, in terms of the original policy objectives of Section 315.[9] And it did so in the form of general exemptions, leaving to the Commission the task of giving content to those exemptions, consistent with Congressional intent and purpose.[10]

Against this background, in 1962 the Commission concluded that non-studio debates between major party candidates were not "bona fide news events"; in 1964 it reached a similar conclusion as to presidential press conferences. In 1975 the Commission reversed these earlier interpretations and ruled that in the future it would find non-studio debates and candidate press conferences to be bona fide news events if broadcasters, in their good faith news judgment, chose to give on-the-spot coverage to them as such.

[8] The amendments were preceded by the Commission's ruling in the Lar Daly case, Columbia Broadcasting System, Inc., 18 P & F Radio Reg. 238, *reconsideration denied*, 26 P & F Radio Reg. 701 (1959), interpreting Section 315 to mean that the equal time rule applied even to the appearance of a candidate on a routine newscast. As the court of appeals noted, this ruling created a national furor in some circles.

[9] *See* S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959).

[10] *See* note 5, *supra; see also* 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler) and 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore).

What the court of appeals had to decide was whether there was anything in the statute, its legislative history, subsequent Congressional action or inaction, judicial interpretation, or otherwise, to preclude such a change of interpretation. Thus, the court of appeals carefully examined the legislative history, which contains material which would support *either* the Commission's earlier or its 1975 rulings. It considered the significance of subsequent Congressional action and inaction, including awareness of the 1962 and 1964 interpretations. It considered the judicial interpretations urged by petitioners. And it considered all the other arguments petitioners advanced as to why the Commission was bound to its 1962 and 1964 interpretations. Having done this, the court concluded that the Commission was not bound to its 1962 and 1964 interpretations; that the 1959 amendments gave the Commission discretion; and that there was substantial support for the 1975 interpretation, even if it was not the only permissible interpretation.

We respectfully submit that what the Commission did, including a re-examination and reversal of its prior statutory interpretations, and the standards by which the court of appeals reviewed that action, are in the mainstream of the regulatory process and raise no important question which this Court need consider.

As a general proposition and apart from the specifics of Section 315 and the 1959 amendments thereto, the courts have long recognized that the Communications

Act granted to the Commission expansive powers.[11] These powers derive both from various provisions in the Act, including those authorizing the Commission "generally [to] encourage the larger and more effective use of radio" (47 U.S.C. § 303(g)) and to adopt rules and regulations implementing the provisions of the Act (47 U.S.C. § 303 (r)), and from the Act's touchstone—the public interest.

The Commission and the courts have also recognized that broadcasting performs a vital social function when it acts as an information medium. Thus, the Commission is directly concerned that stations present news, public affairs, political and other forms of informational programming designed to inform the public generally and the electorate particularly.[12] These aspects of the broadcaster's responsibility have been the subject of this Court's consideration in two comparatively recent cases, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Common to both cases is the recognition that under the Communications Act regulatory and licensing scheme, it is the broadcaster's responsibility to deal with controversial issues and to do so in a fair and even-handed manner.

Further, the courts have acknowledged that the Commission is entitled "to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction." *General Telephone Co. of California* v. *FCC*, 134 U.S.App.D.C. 116, 125-26, 413 F.2d 390, 399-400, *cert. denied*, 396 U.S. 888 (1969).[13]

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[11] *See, e.g.*, Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940).

[12] Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303 (1960); Fairness Report, 48 F.C.C.2d 1 (1974).

[13] *See also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Carter Mountain Transmission Corp. v. FCC, 116 U.S.App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963).

It is with these principles in mind that the Commission's change of regulatory course with respect to the scope of the (a)(4) exemption should be assessed. For it was fully consistent with the general concept of the Communications Act, including broadcaster responsibilities in the presentation of news-type programming, for the Commission to decide upon a construction of the (a)(4) exemption which makes possible more effective news coverage.

The broad administrative and communications law principles which support the Commission's statutory construction action in this case are not unique to the communications field. In *American Trucking Ass'n.* v. *A.T. & S.F.R. Co.*, 387 U.S. 397 (1967), this Court rejected an argument, similar to that of the instant petitioners, that a long history of construction and application of the Interstate Commerce Act precluded a change of approach:

> . . . [W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare SEC v. Chenery Corp., 332 U.S. 194 . . . (1947); FCC v. WOKO, 329 U.S. 223 . . . (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

387 U.S. at 416 (citations omitted).

Rejecting the notion that Congressional acceptance of prior rulings was dispositive, this Court went on to state:

> We do not regard this as legislative history demonstrating a congressional construction of the meaning of the statute, nor do we find in it evidence of an administrative interpretation of the Act which should tilt the scales against the correctness of the Commission's conclusions as to its authority to prescribe the present rules.

387 U.S. at 417-18 (footnote omitted).

Thus, without denigrating the importance of consistency of administrative interpretation, its seems clear that the Communications Act regulatory scheme is one which provides the ability, indeed responsibility, to change course where the Commission concludes that its regulatory direction is no longer correct. Of course, the courts have stressed that the Commission must explain and justify its actions, and that burden is clearly greater when it reverses long standing interpretations. See *Columbia Broadcasting System, Inc.* v. *FCC*, 147 U.S. App. D.C. 175, 454 F.2d 1018 (1971). Here, the Commission decided that its prior construction of the (a)(4) exemption was erroneous. It fully explained its action, including reasons for that action. Its re-examination was "faithful and not indifferent to the rule of law." *Id.* at 183, 454 F.2d at 1026.

II. The Procedure Followed By The Commission Was Consistent With Principles Set Forth By This Court

The 1962 rulings in *Wyckoff* and *Goodwill Station* and *1964 CBS* were all *ad hoc* adjudications.[14] Indeed, historically the Commission has given content to Section

[14] Congress specifically contemplated that the 1959 amendments would be implemented, at least in part, by *ad hoc* adjudications. S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

315 through the process of *ad hoc* adjudications.[15] The 1975 declaratotry order of which petitioners complain was also an adjudication.

The Chisholm petition argues that it was improper for the Commission to reverse, prospectively, its *Wyckoff*, *Goodwill Station* and *1964 CBS* rulings without proceeding through informal (notice and comment) rulemaking,[16] relying particularly upon *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) and *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). The court of appeals did not agree with petitioner's interpretation of these cases, concluding instead that the Commission had discretion to proceed by *ad hoc* litigation; that since the interpretations being reversed were reached by adjudication, reversal by adjudication was particularly appropriate; and that in the circumstances of this ruling there was no advantage to be gained by requiring the Commission to proceed by rulemaking.

As a threshold matter, it should be recognized that the Commission's ruling here under consideration was, first and foremost, *statutory interpretation*. To the extent that it was rulemaking at all, it was *interpretive* rulemaking which is exempt from the procedural requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. § 553 (1970)).

At least since *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), it has been well

[15] From time to time, the Commission publishes a compendium of interpretive Section 315 rulings. *See* Use of Broadcast Facilities by Candidates for Public Office, 19 Fed. Reg. 5948 (1954); 23 Fed. Reg. 7817 (1958); FCC 60-1050, Public Notice 92294, 20 P & F Radio Reg. 1564 (1960); 27 Fed. Reg. 10063 (1962); 29 Fed. Reg. 11286 (1964); 31 Fed. Reg. 6660 (1966); 35 Fed. Reg. 13048 (1970); and Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 37 Fed. Reg. 5796 (1972).

[16] *See* Administrative Procedures Act § 4, 5 U.S.C. § 553 (1970).

established that an administrative agency has broad discretion to proceed either by general rule or by *ad hoc* adjudication. Neither *Bell Aerospace* nor *Wyman-Gordon*, relied upon by petitioner, conflicts with *Chenery*, even though they and *Chenery*, taken together, indicate that there may be circumstances under which rulemaking is preferred and, indeed, instances where a failure to proceed by rulemaking could be construed as an abuse of discretion. However, that is hardly the case here. As indicated above, the Commission has long interpreted Section 315 through adjudicatory rulings, as Congress contemplated. It did so in the *Wyckoff*, *Goodwill Station* and *1964 CBS* rulings. In this case, it merely followed well established and Congressionally sanctioned procedure.

Moreover, as the court of appeals noted, there was no advantage to be gained by requiring the Commission to resort to rulemaking. Petitioners in this court were heard before the Commission on the Aspen Institute and CBS petitions; other parties, including candidates for presidential nomination, were heard.[17] The Commission considered the views of these parties. While the procedure may not have yielded the identical record which would have been compiled through rulemaking, given the basic premise that the agency has a high degree of discretion and the fact that petitioners were heard by the agency, it follows that the Commission's procedure was adequate. Cf. *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 36; 405 F.24 1082, 1104 (1968), *cert. denied*, 396 U.S. 842 (1969).

[17] No party sought rehearing or reconsideration of the Commission's action under 47 U.S.C. § 405 and implementing provisions of the Commission's Rules (47 C.F.R. § 106 (1975)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari should be denied.

Respectfully submitted,

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v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-101

DEMOCRATIC NATIONAL COMMITTEE, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *Respondents,*
CBS, INC., ET AL., *Intervenors.*

No. 76-205

THE HONORABLE SHIRLEY CHISHOLM,
NATIONAL ORGANIZATION FOR WOMEN,
AND OFFICE OF COMMUNICATION OF
THE UNITED CHURCH OF CHRIST, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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BRIEF FOR AMICI CURIAE LEAGUE OF WOMEN VOTERS, COMMON CAUSE, AND ASPEN INSTITUTE PROGRAM IN OPPOSITION

INTEREST OF AMICI

Amicus League of Women Voters of the United States (LWVUS) is a nonprofit, nonpartisan civic membership corporation which has approximately 140,000 members throughout the United States. The LWVUS is exempt from federal income tax under Section 501(c)(4) of the Internal Code of 1954. The LWVUS's primary objective is, and has been since its founding more than 50 years ago, to promote political responsibility through informed and active citizen participation in government and to provide such other services as may be possible in the interest of education in citizenship. The LWVUS is precluded by its bylaws from engaging in partisan political activity. In 1957, the LWVUS created the League of Women Voters Education Fund (LWVEF), a nonprofit educational trust which is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954, and contributions to it are deductible by donors for income tax purposes. The LWVEF is organized and operated exclusively for educational and other charitable purposes, and no substantial part of its activities can consist of the carrying on of propaganda or otherwise attempting to influence legislation. The LWVEF may not participate or intervene in any political campaign on behalf of any candidate for public office or be partisan in its approach to political campaigns.

The LWVUS, its local and state chapters, and the LWVEF have historically conducted a variety of educational activities with respect to elections. The LWVUS/LWVEF provide information concerning candidates for elective office and sponsor debates and

forums with candidates. The local and state chapters across the country regularly hold public meetings during the election to enable citizens to question candidates for public office, thus advancing the goal of an educated electorate. While over a hundred local chapters obtain broadcast coverage of candidate interviews, almost all of the 1300 local chapters sponsor public meetings. Experience indicates that these public meetings are viewed with interest by broadcasters. However, under the previous interpretations of Section 315 of the Communications Act of 1934, as amended[1] they have been reluctant to broadcast such events sponsored by a third party.

The LWVUS/LWVEF believe that the FCC's September 25, 1975 declaratory ruling[2] would remove the major obstacle to broadcast of these candidates meetings. Such action would assure that a greater number of citizens see and hear their candidates for public office and consequently, would assure that the public interest is well served.

Specifically, the LWVEF is planning to present a series of debates between President Ford and Governor Carter, and Senators Dole and Mondale. It has received favorable and serious consideration of these proposals from the candidates.[3] The LWVEF thus has

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[1] 47 U.S.C. sec. 315.

[2] *In re Petition of Aspen Institute Program*, 55 FCC 2d 697 (DNC App. 1a). The petition for a writ of certiorari filed by the Democratic National Committee ("DNC") has as appendices a copy of relevant opinions issued by the FCC and the Court of Appeals. Amici will refer to those appendices.

[3] See, e.g., *The Washington Post*, September 2, 1976, A1 ("Ford, Carter Open Debate Sept. 23").

great interest in securing television coverage of these proposed debates, to the end that the American electorate will be more fully informed concerning the choice for these most important offices.

Amicus Curiae Common Cause is a nonprofit District of Columbia corporation organized to promote, on a nonpartisan basis, social welfare, civic betterment, and social improvement in the United States. Among its major purposes is to facilitate achievement of these objectives by making government more responsive to public needs and demands through reform of the polical process. It has approximately 280,000 dues-paying members throughout the several states and the District of Columbia. Its membership includes citizens of the United States who have been, are, and intend to be:

(a) registered voters for candidates for federal, state, and local elective offices;

(b) candidates for election to federal, state, and local offices, and

(c) active participants in campaigns for election of candidates to federal, state, and local offices.

Amicus Curiae Common Cause and its members have a direct interest in:

(a) the obtaining of meaningful information on the positions of candidates for federal, state, and local office:

(b) maintaining an adequate opportunity for all candidates to disseminate their views; and,

(c) ensuring compliance with constitutional provisions and laws which preserve and protect the foregoing interests.

To promote these interests Common Cause has undertaken a national program for the 1976 campaign to ensure that its membership and citizens are provided with information in detail on how the candidates stand on issues, how the candidates respond to in-depth questioning, and how the candidates have performed over the course of their political lives. Common Cause intends to directly sponsor or encourage others to sponsor in-depth interviews, press conferences, debates, citizens' forums, and hearings in which issues will be fully explored and discussed by candidates for federal, state, and local office.

The Aspen Institute Program on Communications and Society (herein called Aspen Program) has an ongoing project to make the Bicentennial a model political broadcast year. As a part of that project, a conference of several experts with considerable experience in the political broadcast field was held on March 14, 1975 at Washington, D.C. And as a result of suggestions made at the conference, the Aspen Program, through its Director, Mr. Douglass Cater, on April 22, 1975 submitted the petition leading to the Commission action here on appeal.

Aspen Program's purpose in petitioning the Commission can best be pointed up by considering the proposed September 23, 1976 meeting at which the League has invited the major party candidates to debate. This meeting is page one, banner headlines in the Washington Post, Star or the New York Times. The networks also would like to cover the event as only broadcast journalism can uniquely do—an on-the-spot telecast. But if they do and the carriage is not exempt from the equal opportunities requirement of Section 315, they

will have to give equal amounts of free prime time to, say, 13 other "fringe party" candidates.[4] This would be wholly impractical, amounting to many hours and millions of dollars of prime time.[5]

What is the result, then, if carriage of the debate is held to come within the equal time requirement? The debate is not covered by the networks, and unlike the case in the Great Debates of 1960, the American people cannot hear and make their own assessment of the two major party candidates in this uniquely informative context. The fringe party candidates also do not receive any time. There is simply a black-out in this important respect.

That this is the pattern if the equal time requirement is fully applicable is borne out by the consistent testimony of the expert agency, FCC, to the Congress:[6]

[4] This is not fanciful. In 1960 at the time of Nixon-Kennedy debate and the suspension of the equal time requirement, there were on the ballots in several States, 14 other candidates for the Office of President: C. Benton Coiner, Conservative Party of Virginia; Merritt Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. R. L. Decker, Prohibition Party; Farrell Dobbs, Socialist Worker and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party; Eric Hass, Socialist Labor Party, Industrial Government Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitney Harp Slocomb, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rep. No. 1947, 90th Cong., 2d Sess., 3 (1968).

[5] In 1964, the estimates were $2,500,000, if the networks agreed to give equal time to seven other candidates because of a telecast by President Johnson. *Goldwater* v. *Federal Communications Commission*, Case No. 18963, D.C. Cir., (Br. for Federal Communications Commission, 19). The figures would be much higher today.

[6] Hearings on H.R. 13721 before House Subcommittee on Communications and Power, 91st Cong., 2d Sess., June 2, 1970, 5 (Statement of FCC Chairman Burch).

> "In short, section 315 in its present form would appear, as is claimed, to inhibit broadcasters from affording free time to major presidential candidates—and does so, we urge, without any significant practical compensating benefits. The effect of section 315 is not that the Socialist Labor or Vegetaria. candidate gets free time; rather, no one gets any substantial amounts of free time for political broadcasts . . ."

The record fully supports the above conclusion: The networks afford free time only when the program is exempt from the equal time requirement. Fringe party candidates receive coverage only if there is a "fluke" —an isolated mistake by the commercial broadcaster as to applicability of the equal time requirement.

The situation is entirely different if coverage of the joint appearance of the major party rivals at the debate is an exempt program. The networks thereupon present it as on-the-spot coverage of a most important news event, and the American public, just as in the case of the 1960 Great Debates, are better informed—have a better measure of the major party candidates. As a further consequence, a substantial third party candidate, such as George Wallace was in 1968, also receives some significant coverage, although not equal time, with the amount left to the good faith and reasonable judgment of the networks (and subject to review by the FCC or the courts on a fairness complaint only for arbitrariness). The fringe party candidates may receive several minutes of time, as, for example, NBC accorded them in broadcasts in several election years.[7]

[7] E.g., in 1960 NBC invited seven minority party candidates to use air time on an October 30, 1960 program (see Statement of Mr.

Amici submit that the public interest, and particularly the purposes of the First Amendment in promoting robust, wide-open debate, are markedly served by this second course of action. Believing that this course was open to the broadcasters and the Commission under the 1959 Amendments to the law, Aspen Program submitted its petition.[8]

STATEMENT

The essential facts are few and clear:

- In three rulings in 1962 and 1964 (the last by a 4-3 vote), the Commission gave a restrictive construction to the fourth exemption in Section 315 (a) which provides that a broadcaster's on-the-spot coverage of bona fide news events does not come within the "equal opportunities" requirement of the section.[9] In substantial part, the Commission erroneously relied upon a facet of the legislative history that had been repudiated in the conference between the houses.[10]

Robert Kintner, before Senate Communications Subcommittee, January 31, 1961); in 1972 it invited four minority party candidates. NBC states that it will continue this practice; "We have undertaken, and we undertake now, to present minority party candidates on a basis that fully recognizes their following and their importance." Hearings on S.2 before the Senate Communications Subcommittee, 94th Cong., 1st Sess., 80 (1975).

[8] Amici adopt the questions presented and full statement of the case set out in respondents' brief in opposition. The statement that follows is therefore truncated.

[9] *The Goodwill Stations, Inc. (WJR)*, 40 FCC 362 (1962); *National Broadcasting Co. (Wyckoff)*, 40 FCC 370 (1962); *Columbia Broadcasting System, Inc.*, 40 FCC 395 (1964).

[10] See *The Goodwill Stations, Inc. (WJR), supra*, 40 FCC at 364; compare 105 Cong. Rec. 16231, 16241-2 (and H. Rep. 802, 86th Cong., 1st Sess., 2, 7 (1959)) with 105 Cong. Rec. 17778 (and H. Conf. Rep. No. 1069, 86th Cong., 1st Sess., 4 (1959)).

- In 1968, the Court of Appeals sustained the Commission's construction, stating that it found "... no basis for disturbing the Commission's exercise of discretion in issuing the order on review herein, *Philadelphia Television Broadcast Co.* v. *FCC*, 359 F. 2d 282 (D.C. Cir. 1966) ..."[11]
- In 1975, upon the petition of Aspen Institute the Commission, again by divided vote (5-2), set aside the above rulings and issued a new declaratory ruling giving Section 315(a)(4) a construction promoting its broad remedial purpose (DNC App. 7a-12a). The Commission specifically noted its erroneous reliance on faulty legislative history (DNC App. 7a-9a). It also took into account a new development—that the fairness doctrine now affords candidate protection through prompt consideration of their complaints, unlike in 1962 when the doctrine was implemented only at renewal time (DNC App. 12a, n. 18).
- The Court below again affirmed, finding that the legislative history, while inconclusive, affords "... much support for the Commission's new interpretation [and that therefore] we are obligated to defer to the Commission's interpretation, even if it is not the only interpretation possible" (DNC App. 58a-59a).

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[11] *Taft Broadcasting Co.* v. *Federal Communications Commission*, Case No. 22445, D.C. Cir. (unreported), affirming *In re Socialist Labor Party*, 15 FCC 2d 98 (1968).

ARGUMENT

1. The Court below correctly found that the Commission's new construction of Section 315(a)(4)[12] fell within the agency's discretion (DNC App. 59a). See *Philadelphia Television Broadcasting Co.* v. *FCC, supra.* The Congress also stressed the Commission's wide discretion in construing the scope of the exemptions. S. Rep. No. 562, 86th Cong., 1st Sess., 12 (1959).

Taking the words of the statute in their ordinary sense, *Rosenman* v. *United States,* 323 U.S. 658, 661 (1945); *Labor Board* v. *Highland Park Co.,* 341 U.S. 322, 324-25 (1951), there is no question but that a common sense view of the phrase, "on-the-spot coverage of bona fide news events", includes a political news event such as the proposed League Debates. The event *is* news—indeed, page one headline news in the newspapers. It is a bona fide news event, since it is a joint appearance before an outside group that will occur in any event. The statutory language gives one example of a news event—"... including but not limited to political conventions ...". Surely the League debate is the same kind of political event as the acceptance speech of the candidate at the convention.

This last point deserves emphasis. The decided cases show that the exemption in 315(a)(4) covers a range of news events such as broadcasts of court proceedings, even though the judge had become a candidate for

[12] The test, in the Commission's words, "allows reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to eligibility for section 315 exemption to their reasonable good faith judgment." *In re Petition of Aspen Institute Program, supra,* 55 FCC 2d at 708 (par. 30), (DNC App. 12a).

office,[13] a report by the President to the nation on extraordinary international developments (e.g., the Chinese nuclear explosion),[14] a parade or "bridge ribbon-cutting event",[15] and the acceptance speech of the candidate at the convention. There is no sensible or logical way for the Commission to hold all these events as within the exemption and the League debates as outside. Indeed, the only common sense approach is the standard set out in the September 25, 1975 ruling, affording the licensee discretion to make reasonable, good faith news judgments.[16]

The Commission's approach of September 25, 1975 is the only one that makes sense out of the three relevant facets of the 1959 provision.[17] The broadcaster is

[13] *In re Complaint of Thomas Fadell,* 40 FCC 379 (1963), affirmed *Fadell* v. *United States,* No. 14142, 7th Cir., April 29, 1963, unreported.

[14] *Complaint of Republican National Committee,* 40 FCC 408 (1964), affirmed by evenly divided Court, *Goldwater* v. *Federal Communications Commission,* Case No. 18963, D.C. Cir. 1964, *certiorari denied,* 379 U.S. 893 (1964).

[15] See *Use of Broadcasting Facilities by Candidates for Public Office,* 35 Fed. Reg. 13048, 3055 (No. 24) (1970); S. Rep. No. 562, *supra,* at 9.

[16] Such an approach does not render meaningless the other three exceptions to Section 315, or the action of Congress exempting the "Great Debates" through Public Law 86-677. For there would still be a need (i) for the 1960 suspension to facilitate free time to the candidates in any broadcast offered format, including the broadcast debates or (ii) for the 1959 exemptions of bona fide news interviews or documentaries. These are not on-the-spot coverage of news events —they are studio matters. See 106 Cong. Rec. 13424 (1960). See discussion in FCC's September 25th ruling, pars. 25, 26, 28, DNC App. 9a-11a. And it certainly does not render nugatory the main thrust of Section 315—that when a broadcaster sells or gives time to one candidate, it must afford equal opportunities to rival candidates.

[17] Section 315(a)(3), the exemption for the documentary, is not

admittedly given wide discretion to make good faith news judgments in newscasts seen by millions each evening of the campaign; similarly, he can present the candidates to millions of viewers in news interview programs. In both instances, the public interest is further protected by the express applicability of the fairness doctrine (see Section 315(a); *infra,* pp. 14-15). But then, it is argued, the broadcaster is not to be afforded similar reasonable discretion as to the exemption for on-the-spot coverage of news events, and fairness is not suitable back-up protection as to that exemption. Simply on the face of the statute, the latter argument obviously lacks merit.[18] Its illogic is pointed up by consideration of one example—the proposed League debate. The broadcasters are entrusted with wide discretion to select the portions of this news event to be shown on their newscasts but, it is argued, have no journalistic discretion to cover the entire event.

Finally, and most important, the Commission's new construction of Section 315(a)(4) serves to promote robust, wide-open debate. As we have shown (pp. 5-7) the contrary construction inescapably "dampens the

relevant here, because, unlike the other three exemptions, it is expressly limited to the situation where the candidate's appearance is "incidental" to the subject matter of the documentary.

[18] Further, licensees are not reluctant to present candidates on newscasts or news interview shows, which by definition are regularly scheduled. On-the-spot coverage of news events usually requires the licensee to preempt profitable entertainment programming—something it is reluctant to do. Thus, licensees only infrequently engage in the latter process, and when they do, their actions stand out prominently. For these pragmatic reasons, the hole carved into the equal time requirement by the newscast exemption is far greater and more subject to abuse than that for on-the-spot coverage of news events.

vigor and limits the variety of public debate", *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964). It follows that the Commission correctly construed the statute to avoid this serious constitutional issue in the sensitive First Amendment area.

2. The legislative background to Section 315(a)(4) fully supports the Commission's view.[19] Thus, Senator Scott noted that the term news has a "very broad definition"—"[o]f current interest".[20] Chairman Pastore agreed that ". . . news events would necessarily have reference to current events of news importance".[21] Chairman Harris stated that the phrase *"bona fide"* was intended to set up "a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks . . . it is not intended that the exemption shall apply where such judgment is not exercised in good faith . . . [but rather] for [the] purpose [of promoting] the political fortunes of the candidate making an appearance . . .".[22] This shows that good faith journalistic test of (a)(1) and (2) is equally applicable to (a)(4).[23]

[19] We focus on that legislative history because it is obviously crucial. For, the exemption provision of Section 315 has never been amended by the Congress. Thus, any discussions in later Congresses would be of little, if indeed any, significance.

[20] 105 Cong. Rec. 17832.

[21] 105 Cong. Rec. 17830.

[22] 105 Cong. Rec. 17782. This echoes the Conference Report, which stresses that the term bona fide means in the exercise of bona fide news judgment and "where the appearance of a candidate is not designed to serve the political advantage of that candidate". (H. Conf. Rep. No. 1069, 86th Cong., 1st Sess., 4.) And see also S. Rep. No. 562, *supra,* at 14 ("The proposal affords the licensee freedom to exercise his judgment in the handling of this type program . . .").

[23] The test of good faith does afford the licensee "reasonable

It is true that the Congress, in the 1959 Amendments, ". . . did not attempt to destroy the philosophy of equal time; it merely made exceptions . . ."[24] But Congress "surely . . . wants to permit on-the-spot news",[25] and *it was willing to take risks* to make it possible for broadcasters "to cover the political news to the fullest degree".[26] This is stated several times during the floor debate.[27] And it was set forth in S. Rep. No. 562, *supra,* at 10: "The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters." Cf. *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94, 125 (1973) ("calculated risks of abuse are taken in order to preserve higher values."). Prior to its September 25, 1975 decision, the Commission had not followed this balance struck by Congress: It had reduced the risks markedly, but at the expense of achieving the broad remedial purpose of the 1959 legislation.

3. Equally important, the Commission's policies have changed in a way that greatly reduces any risk in giving the amendments their common sense construction

latitude", but it is nevertheless reviewable by the Commission. Barring an extraordinary situation, the Commission would not seek to draw inferences from the programming itself but rather would generally look to independent extrinsic evidence (e.g., the testimony of some station employee). Cf. *Columbia Broadcasting System, Inc. (Hunger in America),* 20 FCC 2d 143, 150-51, (1969).

[24] Statement of Senator Magnuson, 105 Cong. Rec. 14444.

[25] *Ibid.*

[26] *Id.* at 14451.

[27] E.g., statement of Senator Pastore, 105 Cong. Rec. at 14440, 14445.

in line with Congress' remedial purpose. At the time when Congress adopted the 1959 exemptions, there was no back-up relief for the candidate if a station acted unfairly in some exempt situation. For, the Commission considered fairness issues only at renewal, and Congress understood that while that might be a deterrence, it would provide no relief in the context of the campaign.[28] But in 1963 the Commission changed its fairness procedures to rule promptly on fairness complaints, particularly because "a practice of waiting for renewal would be most unfair to candidates in political campaigns and would militate against the all-important goal of an informed elctorate in this vital area."[29] On this ground alone, it was appropriate for the Commission to re-examine its restrictive approach to 315 (a) (4).[30]

[28] See S. Rep. No. 562, *supra,* at 12; 105 Cong. Rec. 14440, 14445.

[29] *Letter to Chairman Oren Harris,* 40 FCC 582, 584 (1963). The Commission has never failed to rule timely on the political fairness complaints (i.e., before the election).

[30] There is the additional consideration that the Commission in 1970 issued the *Letter to Mr. Nicholas Zapple* ruling, 23 FCC 2d 707 (1970)—"a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in Section 315(a)(4)". *First Report,* 39 Fed. Reg. 26385, 26387 (1972). The *Zapple* ruling states that even in non-equal time situations, the broadcaster must treat the major party political candidates in roughly comparable fashion—that is, quasi-equal opportunities. For, the Commission explained (*id.* at 26388):

> . . . If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? [footnote omitted] Clearly, these examples deal with exaggerated, hypo-

CONCLUSION

The decision below is thus correct.[31] Even assuming *arguendo* that it were not, the court below soundly pointed out that if the new construction of Section 315 (a)(4) is in error, Congress would act speedily to repair the situation affecting as it does the political fortunes of the entire membership.[32] Congress has not acted because it obviously does not share petitioners' belief that Section 315 has been gutted.

Significantly, the 1960 suspension worked and served to better inform the electorate, without any unfairness.[33] Yet it is now argued that the much more modest FCC action of September 25, 1975 will have disastrous consequences to the presidential electoral process.

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thetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the *Zapple* ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, is confined to campaign periods) . . .

[31] Petitioners' argument (Chis. Pet. 15-18) that rulemaking was necessary ignores the consideration that this interpretative ruling on the legal issue involved—the proper construction of Section 315 (a)(4)—upset prior *ad hoc* rulings. The Commission's procedure, which afforded petitioners a full opportunity to advance their arguments, was within the agency's discretion in the circumstances. See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Pesikoff* v. *Secretary of Labor*, 501 F. 2d 757, 763 (D.C. Cir. 1974), *certiorari denied*, 419 U.S. 1038 (1974).

[32] Cf. S. Rep. No. 562, *supra*, at 11 ("Should the broadcaster abuse the discretion granted herein, the Committee will move forward immediately to remedy the situation").

[33] See, e.g., Hearings on H.R. 13721 before House Subcommittee on Communications and Power, 91st Cong., 2d Sess., 10-11 (1970); Hearings on H.J. Res. 247 before House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 47 (1963).

The petitions for certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have caused to be served, by First Class United States Postal Service, a copy of the Brief Amicus Curiae of the League of Women Voters of the United States, Common Cause, and the Aspen Institute program, on the following counsel of record, this 10th day of September, 1976:

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